Draft Environmental Assessment, Regulatory Impact Review and Initial Regulatory Flexibility Act Analysis
(EA/RIR/IRFAA)

Extending and Improving the North Pacific Groundfish Observer Program Beyond 2002

Prepared for the North Pacific Fishery Management Council

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Abstract: The regulations that authorize and implement the North Pacific Groundfish Observer Program (Observer Program) expire December 31, 2002. This regulatory analysis package addresses three alternatives. They are: (1) allow the regulations and the Observer Program to expire (the no action alternative); (2) extend the regulations indefinitely with the expectation that they would be amended periodically to maintain or increase the effectiveness and efficiency of the Observer Program; and (3) extend the regulations through December 31, 2007.

In addition, two complementary options for improving the existing regulations are addressed. Option 1 would: (1) change the observer certification and decertification process to ensure that it is compliant with the APA; (2) change the observer certification criteria and standards of behavior to clarify and strengthen these regulations; (3) replace the observer provider (contractor) certification and decertification process with an APA compliant permitting process similar to that used for other NMFS Alaska Region permits; and (4) change the duties and responsibilities of observer providers in order to eliminate ambiguities and to strengthen the regulations governing the relationship between NMFS and the observer providers. Option 2 would increase the ability of NMFS to interact effectively with observers, fishermen, and processing plant employees by granting to NMFS the authority to place NMFS staff and other qualified persons aboard groundfish and halibut vessels and at groundfish plants.

1.0 Introduction

The groundfish fisheries in the exclusive economic zone (EEZ) off Alaska are managed by the NMFS under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (MSA) and the Pacific halibut fishery off Alaska is managed under 50 CFR 300.60 to .65 (Subpart E). The mission of the NMFS is the stewardship of living marine resources for the benefit of the nation through their science-based conservation and management. The NMFS strategic plan for accomplishing that mission contains the following three goals: (1) Rebuild and maintain sustainable fisheries; (2) Promote the recovery of protected species; and (3) Protect and maintain the health of coastal marine habitats.

The groundfish fisheries are managed under the Fishery Management Plan (FMP) for Groundfish of the Gulf of Alaska (GOA) and the Fishery Management Plan for the Groundfish Fisheries of the Bering Sea Aleutian Islands area (BSAI) developed by the North Pacific Fishery Management Council (Council) under the MSA. These FMPs were approved by the Secretary of Commerce and became effective in 1978 and 1982, respectively. The FMPs for the BSAI and GOA have each been amended more than 50 times.

Regulatory actions taken to achieve the three NMFS goals must meet the requirements of the MSA, the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), the Marine Mammal Protection Act (MMPA), Executive Order (E.O.) 12866, the Regulatory Flexibility Act (RFA), and other applicable laws.

NEPA, E.O. 12866 and the RFA require the following: (1) a description of the purpose, need, and legal basis for the proposed action; (2) a description of the proposed action and alternative actions which may address the problem; and (3) analysis of the effects of the proposed and alternative actions. These three requirement are met by the information contained in Sections 1, 2, and 3, respectively. The more specific analyses of the effects that are most relevant to the NEPA, E.O. 12866, and the RFA are in Sections 4, 5, and 6, respectively.

This draft Environmental Assessment/Regulatory Impact Review/Initial Regulatory Flexibility Act Analysis (EA/RIR/IRFAA) document addresses three alternatives. They are: (1) allow the regulations that authorize and implement the North Pacific Groundfish Observer Program (Observer Program) to expire December 31, 2002 (the no action alternative); (2) extend the regulations indefinitely with the expectation that they would be amended periodically to maintain or increase the effectiveness and efficiency of the Observer Program; and (3) extend the regulations through December 31, 2007. In addition, two complementary options for improving the existing regulations are addressed. The options would: (1) increase NMFS' management controls over observer providers and observers by strengthening the regulations governing the relationship between NMFS and the observer providers and observers; and (2) increase the ability of NMFS to interact effectively with observers, fishermen, and processing plant employees by granting to NMFS the authority to place NMFS staff and other qualified persons aboard groundfish and halibut vessels and at groundfish plants.

1.1 Background

Limited background information is presented in this section. Appendix A contains more detailed information on the development of the Observer Program for the domestic groundfish fisheries of the BSAI and GOA, the attempts to improve the Observer Program, and the uses of information provided by the Observer Program.

The regulations that implemented the Observer Program are currently set to expire on December 31, 2002. Therefore, the North Pacific Fishery Management Council Observer Advisory Committee (OAC) and the National Marine Fisheries Service (NMFS) are in the process of developing regulations that would ensure

that the Observer Program will continue to perform its critical scientific, conservation and management functions and to do so more effectively.

Participants in the BSAI and GOA groundfish fisheries have had observers deployed on their vessels since 1973. The current Observer Program for the domestic fishery was implemented in 1990, the last year in which foreign fishing vessels participated in the Alaska groundfish fishery. Data provided by the Observer Program is a critical element in the conservation and management of groundfish, other living marine resources, and their habitat. For example, these data are used for: (1) assessing the status of groundfish stocks; (2) setting and monitoring groundfish quotas; (3) monitoring the bycatch of non-groundfish species; (4) assessing the effects of the groundfish fishery on other living marine resources and their habitat; and (5) assessing methods for improving the conservation and management of groundfish, other living marine resources and their habitat. Due to the critical uses of observer data, it is essential that the Observer Program be extended beyond 2002 and that the Observer Program be improved by addressing both perceived and actual sources of data quality problems.

Since 1990, the number of observer deployment days per year ranged from about 20,000 to almost 36,400. In 2000, 354 individual catcher vessels, catcher/processor, and motherships carried observers. Observers collected data from an additional 27 shoreside and floating processors during that year. With an estimated cost to the industry of $350 per deployment day including payments to observer providers, transportation costs, and board costs, the total cost to the industry was almost $13 million. This was about 2.3 percent of the gross ex-vessel revenue from the retained groundfish catch in the BSAI and GOA groundfish fisheries and almost 1 percent of the gross revenue from the resulting seafood products after primary processing.

In designing the Observer Program in 1989, NMFS and the North Pacific Fishery Management Council (Council) were limited in their options because the MSA lacked any provision to charge the domestic industry fees to pay for the cost of observers and Congress did not provide funds to cover the cost of observers. The need for observers and the data they provide was determined to be sufficiently critical and urgent that the Council and NMFS decided not to wait for the MSA to be amended and went forward with Observer Program regulations which established observer coverage requirements for vessels and processors participating in the BSAI and GOA groundfish fisheries and required those vessels and processors to arrange for observer services from an observer provider (contractor) or providers certified by NMFS. The Council and NMFS identified several problems with this method of procuring observer (or service delivery model) and made a commitment to work to amend the MSA to allow fees to be collected to pay for observers. They also made a commitment to change the procurement method as soon as they had the authority to collect such fees.

The problems that were identified with the service delivery model before and since it was implemented include the following:

1.1 The basis for a conflict of interest exists because the vessels and processors have a business relationship with the observer providers and because the observers have a business relationship with their observer providers.

1.2 The competition among observer providers to decrease costs for the fishing industry and to be more profitable can adversely affect data quality.

1.3 The placement of observers on vessels with 30 percent coverage requirements is not random.

1.4 This may not be an equitable way to pay for the cost of observers. For example, the cost borne by a fishing operation may not be related to either the benefits it receives from the Observer Program or its ability to pay for an observer.

1.5 There is a lack of flexibility in placing observers.

1.6 There is less direct support by NMFS for observers.

1.7 NMFS does not have a business relationship with the observer providers which can be used to control the performance of the observer providers and the observers.

The recognition of the need to change the service delivery model is demonstrated by the fact that the Council and NMFS dedicated significant resources to amend the MSA so that fees could be collected, to implement the Research Plan fee collection program, and to attempt to implement a joint project agreement (JPA) with the Pacific States Marine Fisheries Commission (PSMFC) after the fee collection program was rescinded. That need was also identified in external and internal examinations of the Observer Program. The external review was conducted for NMFS by MRAG Americas, Inc., a consulting firm with global experience in Observer Programs. A recent internal review, the NMFS 2000 Management Control Review, addressed the service delivery models used in the various NMFS observer programs.

Before going into detail on the alternatives being considered, it is important to put the current Observer Program in some perspective. Notwithstanding the many problem areas NMFS, Council staff, and OAC have worked on, the Observer Program represents a remarkable collaborative effort of NMFS, industry, observer providers, observers, and Council staff. These collective efforts annually result in data from over 30,000 observer coverage days which are used to successfully manage the highly productive groundfish fisheries off Alaska. NMFS believes the Alaska groundfish stocks are well managed, and the Observer Program, through observers, is one of the necessary foundations to that success. We wish to acknowledge the many staff, industry, observers, and observer providers who contribute to these efforts. We hope to demonstrate that the proposed regulatory actions offered below will help in improving that effort through an achievable short-term approach. This approach is in part a proactive attempt to protect the quality of observer data as expected changes in fishery management programs increase the need for estimates of catch and bycatch by vessel.

1.2 Purpose, Need, and Legal Basis for the Actions

The purpose of the actions being considered is to extend and improve the Observer Program beyond 2002. The need for those actions is based on the importance of the Observer Program for the successful conservation and management of the BSAI and GOA groundfish fisheries, other living marine resources, and their habitat.

The management of the BSAI and GOA groundfish fisheries has been successful in terms of rebuilding and maintaining sustainable groundfish fisheries; monitoring and controlling the bycatch of prohibited species; monitoring and controlling direct interactions with protected species; generating substantial employment and income for those involved in harvesting and processing groundfish, as well as for other residents of fishing communities, including the community development quota (CDQ) communities; and providing large quantities of seafood products for domestic and foreign consumers. The domestic groundfish fishery off

Alaska is an important segment of the U.S. fishing industry. With a total catch of 1.8 million metric tons (t), a retained catch of 1.6 million t, and an ex-vessel revenue of $565 million in 2000, it accounted for 44% of the weight and 16% of the ex-vessel revenue from total U.S. domestic landings as reported in Fisheries of the United States, 2000 (Hiatt, Felthoven and Terry, 2001). The gross revenue from the resulting seafood products after primary processing was approximately $1.3 billion.

The information provided by the Observer Program has had a key role in the success of the groundfish management regime and much of that regime was built with the understanding that the Observer Program would continue to exist. For example, the prohibited species catch (PSC) limits, which have been a key factor in controlling the bycatch of prohibited species, could not be used without the Observer Program. Similarly, it would not be possible to monitor total allowable catches (TACs) in terms of total catch without the Observer Program. In addition, much of the information that is used to assess the status of groundfish stocks, to monitor the interactions between the groundfish fishery and marine mammals and sea birds, and to analyze fishery management actions is provided by the Observer Program.

Unless action is taken, the regulations that authorize and implement the Observer Program will expire at the end of 2002. Therefore, there is a need to extend the regulations that authorize and implement the Observer Program. There is also a need to improve those regulations in order to continue to address the deficiencies of the existing service delivery model and regulations. Such improvements are necessary to maintain or increase the quality of the data provided by the Observer Program.

In assessing the appropriate course of action in light of the inability to effectively implement either the Research Plan or JPA, it was determined that a step-wise approach to Observer Program restructuring would be most effective and feasible. This approach would de-link the more difficult and controversial issues from the more straightforward needs, such as administrative improvements included in this proposed action, and would increase the likelihood that workable components could be developed, agreed upon by affected parties, and implemented in a timely manner. The more difficult major issues, such as developing an alternate funding mechanism and revising observer coverage levels and placement, would be treated individually as appropriate.

The approach to the Observer Program restructuring described above is a cautious approach that is expected to be developed and implemented over time. The management objective of this action is to provide for the continued operation, beyond 2002, of the Observer Program and to allow for the development and implementation of an overall step-wise restructuring of the Observer Program without the administrative burden of rulemaking to extend the Observer Program authority every few years. Additionally, the options considered in this document would increase the quality of Observer Program data by: (1) increasing NMFS' management controls over observer providers and observers by strengthening the regulations governing the relationship between NMFS and the observer providers and observers; and (2) increasing the ability of NMFS to interact effectively with observers, fishermen, and processing plant employees by granting to NMFS the authority to place NMFS staff and other qualified persons aboard groundfish and halibut vessels and at groundfish plants. The former can be done in part by ensuring that the administrative procedures NMFS uses in dealing with observer providers and observers are compliant with the Administrative Procedures Act.

The Administrative Procedure Act

The Administrative Procedure Act (APA) includes the Privacy Act, the Freedom of Information Act (FOIA),

and rule-making and adjudication procedures. The APA prescribes uniform standards for the conduct of rule-making and adjudicatory proceedings and rules for judicial review of agency decisions. The APA procedures apply to agency permitting, certification and licensing decisions. These decisions include granting, denying, renewing, revoking, suspending, annulling, withdrawing and amending a license, certificate or permit.

Standards and criteria for issuance of certifications or permits must be comprehensible and clearly describe the certification/permitting requirements. If the applicant fails to meet the criteria, a decision to deny the application for the certification or permit must be issued in writing and notice given that decision may be reviewed upon request. Similarly, the performance standards for those who have been issued certifications or permits must be comprehensible and clearly described. If the performance standards are not met, the agency can make a decision to suspend or revoke a certification or permit or impose a fine after providing the certification or permit holder with both a notice of the agency's intent to proceed with such a sanction and an opportunity to explain why the proposed sanction is not warranted.

Review of these agency determinations or decisions through an appeal must be provided by the agency. Such review occurs before a Hearings Officer or Administrative Law Judge (ALJ). These officials may be an employee of the agency, but they retain independence from the program denying the application. The ALJ or Hearings Officer can reverse or uphold the agency determination. An interim permit allowing the aggrieved party to continue work pending the review can be ordered. The APA provides that any appeal of an agency's final determination would be taken directly to the United States District Court.

1.3 Related NEPA and Fishery Description Documents

Related NEPA documents and documents that describe the fisheries are identified and briefly discussed in Appendix B. That appendix also contains a description of the fleet, fishery, and affected industry.

2.0 Description of Alternatives

The alternatives and options analyzed in this document are described in this section. The problems being addressed by specific elements of the alternatives and options and the expected effects of the alternatives and options are discussed initially in Section 3. Other changes that were considered but rejected as this set of alternatives and options was developed are identified and discussed briefly in Appendix C. The actions described in this section are intended to improve the Observer Program. Mechanisms for further improvements, some of which will take longer to develop, are also described in Appendix C.

2.1 Alternative 1: Status quo - No Action

If no action is taken, regulations implementing the Observer Program will expire on December 31, 2002. This would eliminate the Observer Program as a mechanism for providing information that is used to support the fishery management and conservation activities described in Section 1 and in Appendix A.

2.2 Alternative 2: Extend the Current Groundfish Observer Program Indefinitely Beyond 2002

This alternative would extend indefinitely the current groundfish observer coverage requirements and implementing regulations for the Observer Program that otherwise would expire December 31, 2002. This action would allow the Observer Program to operate without interruption and it would allow for the regulations to be amended periodically to maintain or increase the effectiveness and efficiency of the Observer Program. In addition, it would eliminate the administrative burden of rulemaking to extend the Observer Program authority every few years. Therefore, this action would be a first step in restructuring the Observer Program. Two complementary options for this alternative which would be additional steps in restructuring are described in sections 2.4 and 2.5.

2.3 Alternative 3: Extend the Current Groundfish Observer Program through December 31, 2007

This alternative would extend through December 31, 2007 the current groundfish observer coverage requirements and implementing regulations for the Observer Program. This action would allow, the Observer Program to operate without interruption through 2007 and it would allow the regulations to be amended periodically to maintain or increase the effectiveness and efficiency of the Observer Program. It would not eliminate the administrative burden of rulemaking to extend the Observer Program beyond 2007. This action would not be a first step in restructuring the Observer Program. However, two complementary options for this alternative which would be steps in restructuring are described in sections 2.4 and 2.5. The expiration date of December 31, 2007 was selected based on an anticipation that regulations to implement a restructured Observer Program could be in place by then.

2.4 Option 1 for Alternatives 2 and 3: Increase NMFS' Management Controls over Observer Providers and Observers

Option 1 was developed in response the following: (1) NMFS and OAC recommendations that NMFS analyze methods of strengthening the regulations governing the relationship between NMFS and the observer providers (contractors) to ensure sufficient management controls; and (2) concerns raised by NOAA General Counsel that some aspects of the process for certifying and decertifying observer providers and observers may not meet the standards of the Administrative Procedures Act (APA).

Option 1 would increase NMFS' management controls over observer providers and observers by: (1) changing the process for certifying and decertifying observer providers and observers to ensure that the process is compliant with the APA; (2) clarifying the criteria, duties, responsibilities, and standards of conduct for observer providers and observers; (3) eliminating ineffective or unnecessary requirements; and (4) adding new requirements to better address performance issues of particular concern. The changes proposed to do this are described below. The problems the changes are intended to address and the expected effects of the changes are discussed in Section 3.4.

In addition, NMFS proposes to replace the term "observer contractor" with the term "observer provider". NMFS believes the term "observer provider" better describes what the observer providers do and eliminates any suggestion that NMFS has contracts with the observer providers.

Although many proposed changes to the Observer Program regulations are included in Option 1, the Council/NMFS can select, modify, or reject each proposed change. The analysis in later sections provides a comparison between the status quo and each proposed change to the status quo. Therefore, the analysis addresses both the status quo and the proposed change for each element of the Observer Program regulations addressed by Option 1. In some instances sub-options are identified and analyzed.

2.4.1 Change the observer certification and decertification process to ensure that it is compliant with the APA

The observer certification process needs to be formally established through regulation. Rulemaking should address the following:

1. By current regulations, certification ends after each deployment. It is proposed that the observer certification would be valid indefinitely, unless it is rescinded by the agency or unless the observer is inactive for more than 18 months. Observers will have to meet any training needs required by the Observer Program, such as the annual 4-day and 1-day briefings, CDQ training, and CDQ briefing, prior to each deployment.

2. A process needs to be established through regulation whereby an application for observer certification is reviewed and certification is either approved or denied. A formal appeals process needs to be in place to deal with denials.

3. An observer applicant who is initially denied certification must have appeal rights that are compliant with the APA. This may result in the appeal being ultimately made to the Alaska Region Office of Administrative Appeals (OAA). The process currently being used by the OAA for permit applications is APA compliant. The OAA's decision will be the Agency's final decision, unless the Science and Research Deputy Director for the Alaska Region modifies the OAA's decision.

4. Two sub-options are proposed regarding the application requirement for currently certified observers:
   (i) they would have grandfather rights under the new regulations and would not have to reapply or
   (ii) they would not have grandfather rights under the new regulations and would have to reapply.

The suspension/decertification process is currently laid out through regulations. However, to ensure its adequacy under the APA, several areas for improvement have been identified through coordinated efforts between the Observer Program Office (OPO) and NOAA General Counsel.

1. Some recommended improvements can occur through internal changes to OPO procedures, and do not require additional rulemaking. Examples of these changes are internal operation time lines for addressing and finalizing decertification, administrative recordkeeping, and training for staff.

2. When the OPO makes the initial Agency decision to suspend or decertify an observer, the observer has the right to appeal that decision. The Appeals Officer has resided in the OPO. Changes are needed to establish the OAA as the Observer Suspension and Decertification Appeals Official. This would remove potential bias, improve fact finding capabilities, and ensure the application of legal standards. The OAA's decision will be the Agency's final decision, unless the Science and Research Deputy Director for the Alaska Region modifies the OAA's decision.

3. The penal system would remain an option for NOAA General Counsel and NMFS Enforcement to use in the case of criminal violations such as fraud.

2.4.2 Change the observer certification criteria and standards of behavior to clarify and strengthen these regulations

Some of the following changes principally are intended to clarify the standards of behavior in order to help ensure that they provide clear guidance to observers and can be used as a basis for suspending or decertifying an observer. The legal issue addressed by such changes is not strictly an APA compliance issue, it is a more generic due process issue. Other changes are proposed principally to address non-legal issues. They are intended to extend the certification criteria and standards of behavior in order to decrease problems that are not addressed adequately by the existing regulations. Finally, there are a few changes that address both legal and non-legal issues (legal/non-legal). The principal issue being addressed by each proposed change is identified as a legal, non-legal, or legal/non-legal issue.

1. A criterion would be added so that an individual with a past criminal record would not be eligible to be certified as an observer. Two sub-options are proposed. (Non-legal issue)

   (i) An addition would be made to the observer certification criteria so that an individual who has been convicted of a felony would not be eligible to be certified as an observer. Felonies are generally distinguished in law from minor offenses by the serious nature of the offense and the level of punishment (e.g., imprisonment lasting more than one year).

   (ii) An addition would be made to the observer certification criteria so that an individual who has been convicted of a crime of dishonesty would not be eligible to be certified as an observer. Examples of crimes of dishonesty are: fraud, forgery, extortion, embezzlement, and certain kinds of theft, such as the use of a stolen credit card.

2. The following changes would be made to Standards of Behavior (A): (Legal issue)

Observers must ~~diligently~~ perform their assigned duties as described in the Observer Manual or other written instructions from the Observer Program.

3. The following changes would be made to Standards of Behavior (D) (Legal issue):

Observers must refrain from engaging in any illegal actions or any other activities that would reflect negatively on their image as professional scientists, on other observers, or on the Observer Program as a whole. This includes, but is not limited to:

(1) ~~Engaging in excessive drinking of alcoholic beverages~~ Violating the drug and alcohol policy established by the Observer Program;

(2) Engaging in the use, possession, or distribution of illegal drugs; ~~or~~

(3) ~~Becoming physically or emotionally involved~~ Engaging in sexual relations with ~~vessel or processing facility~~ personnel of the vessel or processing facility to which the observer is assigned, or with any vessel or processing plant personnel who may be substantially affected by the performance or nonperformance of the observer's official duties.

2.4.3 Replace the observer provider (contractor) certification and decertification process with an APA compliant permitting process similar to that used for other NMFS Alaska Region permits.

1. The application criteria would not be changed.

2. A new applicant seeking to become an observer provider would be required to submit an application to the Observer Program describing the applicant's ability to carry out the responsibilities and duties of an observer provider and the arrangements to be used.

3. New applicants can submit an application at any time.

4. The Observer Program Office, not the Regional Administrator, would make the initial Agency determination on whether to issue an observer provider permit based on the information submitted by applicants and on other selection criteria that are available from the Observer Program Office.

5. The application would be rated by a NMFS panel and a decision made. The process would be iterative so that an applicant has the opportunity to modify its proposal based on reviewers comments.

6. An applicant who is initially denied an observer provider permit may appeal to the Alaska Region Office of Administrative Appeals (OAA). The OAA's decision will be the Agency's final decision, unless the Regional Administrator modifies the OAA's decision.

7. An observer provider permit would be valid indefinitely unless rescinded by the agency or unless the permit expires because the observer provider is not active in deploying Observer Program observers for more than one year.

8. The enforcement of the observer provider responsibilities and duties would be in accordance with the Department of Commerce regulations under 15 CFR 904. These regulations set forth the procedures governing NOAA's administrative proceedings for assessment of civil penalties, suspension, revocation, modification, or denial of permits, issuance and use of written warnings, and release or forfeiture of seized property. The Alaska Regional Office would no longer make the initial agency determination concerning permit sanctions. Instead, NOAA General Counsel and Enforcement personnel would resolve regulatory compliance issues. However, NMFS Observer Program staff would continue to work directly with observer providers to address problems and avoid any compliance issues.

9. Two sub-options are proposed regarding the application requirement for currently certified observer providers:
   (i) they would have grandfather rights under the new regulations and would not have to reapply or
   (ii) they would not have grandfather rights under the new regulations and would have to reapply.

2.4.4 Change the duties and responsibilities of observer providers (contractors) in order to eliminate ambiguities and to strengthen the regulations governing the relationship between NMFS and the observer providers

As was done for the proposed changes to the performance standards for observers, the principal issue being addressed by each proposed change to the duties and responsibilities of observer providers is identified as a legal, non-legal issue, or legal/non-legal issue.

1. The following changes would be made to the items currently listed as observer provider responsibilities and duties in the regulations at:

   a. (i) Recruiting, evaluating, and hiring qualified candidates to serve as observers~~, including minorities and women.~~ (Non-legal issue)

   b. Two sub-options for 50 CFR §679.50 (i)(2)(ii): (Non-legal issue)
      i) Ensuring that only observers with valid North Pacific groundfish observer certification provide observer services and that these observers are: 1) fit for duty at the time of embarkation, and 2) have successfully completed all NMFS required training before deployment. Fit for duty means the observer is fully capable of performing all their assigned duties.
      i) Ensuring that only observers with valid North Pacific groundfish observer certification provide observer services and that these observers are: 1) fit for duty at the time of embarkation, and 2) have successfully completed all NMFS required training before deployment. Fit for duty means if an observer is sick or injured at the time of embarkation, they must first receive a clearance to work from a licensed health professional before deployment.

c. (iii) Providing observers as agreed to in signed and valid contracts with its clients ~~requested by vessels and processors~~ to fulfill requirements under paragraphs (c) and (d) of this section. (Legal/non-legal issue)

d. (iv) Providing observers' salary, any other benefits and personnel services ~~in a timely manner~~ as dictated by the terms of the observers' contract or Union agreement. (Legal/non-legal issue)

e. (v)(c) A deployment cannot include assignments to more than four vessels, including groundfish and all other vessels, and/or shoreside processors. (Non-legal issue)

f. ~~(vi) Supplying alternate observers or prospective observers if one or more observers or prospective observers are not approved by NMFS, fail to successfully complete observer training or briefing, are injured and must be replaced, or resign prior to completion of duties~~. (Non-legal issue, but related to item c which is in part a legal issue)

g. (viii) ~~In cooperation with vessel or processing facility owners, ensuring~~ Ensuring that all observers' in-season catch messages and other required transmissions between observers and NMFS are delivered to NMFS within a time specified by the ~~Regional Administrator~~ Observer Program. (Non-legal issue)

h. (ix) Ensuring that observers complete in-person mid- deployment data reviews ~~when~~ as required, unless specifically exempted ~~required~~ by the Observer Program. (Non-legal issue)

i . (x) Ensuring that, within 5 days after the completion of an observers' deployment, observer providers contact the Observer Program to schedule a date for debriefing ~~observers complete debriefing as soon as possible after the completion of their deployment, and at locations~~ at the time and place specified by the ~~Regional Administrator~~ Observer Program, and that the observer report for their scheduled debriefing, and complete all debriefing responsibilities. (Legal/non-legal issue)

j. (xi) Ensuring all data, reports, and biological samples from observer deployments are ~~complete and~~ submitted to NMFS at the ~~time~~ completion of the debriefing ~~interview~~ survey. (Non-legal issue)

k. (xiii) Monitoring observers' performance to ensure ~~satisfactory~~ execution of duties ~~by observers~~ and ~~observer~~ conformance with NMFS' standards of observer conduct under paragraph (h)(2) of this section. (Non-legal issue)

l. (xiv) Providing the following information to the Observer Program Office by electronic transmission (e-mail), fax, or other method specified by NMFS. (Non-legal issue)

(A) Observer training registration consisting of a list of individuals to be hired upon approval by NMFS and a copy of each person's academic transcripts and resume, ~~and application for observer employment~~. The list must include the person's full name (i.e., first, middle and last names), date of birth, and sex. ~~The person's social security number is~~

~~requested .~~Observer briefing registration consisting of a list of the observer's full name, requested briefing class, date of class, and briefing location. ~~If the Observer Program Office has excused an observer from attending a briefing, the briefing registration must also include the names of observers excused from briefing, the date the observer was excused, and the name of the NMFS staff person granting the excuse.~~ This information must be submitted to the Observer Program Office at least 5 working days prior to the beginning of a scheduled observer certification training or briefing session.

m. (E) Copies of "certificates of insurance", that name the NMFS Observer Program ~~Task~~ Leader as a "certificate holder", shall be submitted by February 1 of each year. The certificates of insurance shall verify the following coverage provisions and state that the insurance company will notify the certificate holder if insurance coverage is changed or canceled (Non-legal issue):
   (1) Maritime Liability to cover "seamen's" claims under the Merchant Marine Act (Jones Act) and General Maritime Law ($1 million minimum).
   (2) Coverage under the U.S. Longshore and Harbor Workers' Compensation Act ($1 million minimum).
   (3) States Worker's Compensation as required.
   (4) Commercial General Liability.

n. (H) Reports of observer harassment, or any prohibited action against observers as identified in §679.7(g), concerns about vessel or processor safety, any observer illness or injury that prevents them from completing their duties, and observer performance, standards of behavior, and conflict of interest problems, must be submitted within 24 hours after the observer provider becomes aware of the problem. (Non-legal issue)

2. The following changes would be made to the existing conflict of interest regulations for observer providers. (Non-legal issue)

   (ii) Observer providers must assign observers without regard to any preference by representatives of vessels and shoreside facilities ~~based on observer race, gender, age, religion, or sexual orientation~~ other than when an observer will be deployed.

3. The following would be added to the current list of observer provider responsibilities and duties: (Non-legal issue)

   a. Observer providers must meet the requirements for an observer candidate interview specified by the Observer Program. The following sub-options are being considered:
      i) Observer providers must meet the requirements for an observer candidate interview specified by the Observer Program.
      ii) Observer providers must furnish a NMFS produced pamphlet of information describing the observer job to all observer candidates prior to hiring.
      iii) Observer providers must meet the requirement for an observer candidate interview specified by the Observer Program and must furnish a NMFS produced pamphlet of information describing the observer job to all observer candidates prior to hiring.

   b. Observer providers must ensure that their observers meet the requirements of the observer

drug and alcohol policy specified by the Observer Program.

c. Observer providers must verify that the vessel has a valid USCG safety decal before placing an observer onboard.

d. Observer providers must allow observers on pollock catcher vessels delivering shoreside the time necessary to complete their sampling at shoreside plants.

e. Observer providers must ensure that their observers complete their vessel and/or plant surveys before performing other jobs or duties which are not part of NMFS groundfish requirements.

2.5 Option 2 for Alternatives 2 and 3: Grant NMFS the Authority to Place NMFS Staff and Other Qualified Persons Aboard Vessels and at Plants

Option 2 was developed by NMFS to allow a more effective use of NMFS staff with respect to meeting the mission of the Observer Program. Specifically, this option would grant NMFS the authority to place NMFS staff and other qualified persons on fishing vessels and at processing plants. This would include deployments to any plant that receives groundfish and any vessel that targets groundfish or halibut in the North Pacific.

The term "qualified persons" includes NMFS staff, contracted parties (e.g., MRAG Americas Inc.), and University of Alaska Anchorage Observer Training Center (OTC) staff. Deployment of these individuals would be in addition to or in lieu of deployments of contracted groundfish observers. In order to provide observer coverage for vessels and plants, qualified persons would be required to have training or experience as observers. While NMFS intends to primarily deploy Observer Program training, debriefing, and field staff; it has identified the need to deploy other qualified persons in certain situations.

At present funding and staffing, NMFS estimates it can accomplish 500 deployment days each year. NMFS also estimates that it would have staff act as observers for approximately 350 of those days and perform other duties the remaining 150 days. At 36,500 observer coverage days per year (2001 -2002 data), 350 days equates to just under 1% of the average observer days each year.

Sub-Options For Affected Entities and the Number of Deployment Days

There are two sub-options that would alter which entities will be affected by this proposal: (1) exempt vessels less than 60' LOA from NMFS deployments and (2) exempt halibut vessels from NMFS deployments. If neither sub-option is selected this proposal includes any plant that receives groundfish and any vessel that targets groundfish or halibut.

There is one sub-option that would limit the number of NMFS deployment days each year. If selected, this sub-option would initially cap deployments at 750 days per year, but that cap could be modified through a regulatory amendment. The initial cap of 750, of which approximately 70% would be used to have NMFS staff work as observers, represents approximately 1.5% of the total observer deployment days (2000 - 2001 data). If this sub-option is not selected there would be no cap to the number of days NMFS could deploy staff or qualified persons.

The changes proposed to provide NMFS this authority are described below. The problems the changes are

intended to address, an explanation of how the proposed changes are expected to solve those problems, and the expected effects of the changes are discussed in Section 3.5.

The Observer Program regulations would be amended to give NMFS the regulatory authority to:

1. Place qualified persons at any plant that receives groundfish or on any vessel that targets groundfish or halibut in the North Pacific.

2. Determine on which trips and vessels or for what periods and at which processing plants qualified persons would be deployed.

3. Determine the work to be performed during each deployment.

4. Determine if the deployed person would perform the normal work of an observer.

5. Determine whether the deployment would count towards the required observer coverage of the vessel or plant.

NMFS would not have the authority to order a vessel to port to facilitate the deployments; however, a vessel selected by NMFS for such a deployment would be required to provide scheduling information to NMFS. The primary intent for NMFS deployments would be to resolve sampling issues on vessels and at plants that are required to carry groundfish observers. Staff or qualified persons may also be deployed to fulfill data needs that would require them to perform non-observer duties and possibly work on vessels that do not require observer coverage.

Just as observers report potential violations, any potential violations observed by NMFS staff or qualified persons during deployments would be reported to the captain of the vessel and could result in an enforcement action. The purposes for NMFS deploying qualified persons would include the following:

1. Satisfy requests for assistance from vessels or plants.
2. Solve perceived sampling issues.
3. Create new sampling schemes through proactive measures.
4. Work cooperatively with vessels and plants on observer issues (e.g., address potential regulatory compliance concerns).
5. Create vessel and plant specific sampling profiles that include industry input.
6. Keep NMFS and OTC staff current with the realities of working at sea.
7. Assist in developing and implementing special sampling projects.
8. Place staff or other qualified persons in fisheries with minimal or no observer coverage requirements (e.g., vessels less than 60' LOA and halibut vessels).

3.0 Problems, Proposed Solutions, and Expected Effects

3.1 Alternative 1 (the no action alternative)

If no action is taken, regulations implementing the Observer Program will expire on December 31, 2002. This would eliminate the Observer Program as a mechanism for providing information that is used to support the fishery conservation and management activities described in Section 1 and in Appendix A. The information available to make conservation and management decisions would be decreased substantially and as noted above, much of the current groundfish management regime is based on the assumption that information will continue to be provided by the Observer Program. Therefore, some fundamental changes would have to be made to the management regime. The effects of those changes would be addressed in the regulatory analysis documents that would have to be prepared to implement such changes.

The direct and indirect costs to the fishing industry of deploying observers, the distribution of the direct costs, and the costs that accrue to NMFS are discussed under Alternative 2. Those costs, the associated income of observer providers and observers, and other costs that accrue to the fishing industry would be eliminated with Alternative 1. If catch and production were decreased by just a few percent to implement more conservative management in the absence of the Observer Program, the reduction in income from the groundfish industry probably would exceed the decrease in Observer Program related costs. The widespread support for the Observer Program among the stakeholders in the BSAI and GOA groundfish fishery, suggests that the elimination of the Observer Program would result in net losses to various groups of stakeholders and to the Nation as a whole.

3.2 Alternative 2: Extend the Current Observer Program Indefinitely

This alternative would extend the current Observer Program regulations indefinitely with the expectation that they would be amended periodically to maintain or increase the effectiveness and efficiency of the Observer Program. Therefore, the Observer Program would continue to provide critical information for the conservation and management of groundfish, other living marine resources, and their habitat. The groundfish management regime, that was developed based on the assumption that the Observer Program will continue to provide critical information, could continue to operate without the fundamental changes that would be required if the Observer Program were eliminated.

The deployment of observers would be similar to that in 2000. The total number of observer deployment days in 2000 was 36,358. With an estimated cost to the industry of $350 per deployment day including payments to observer providers, transportation costs, and board costs, the total cost was almost $13 million. This was about 2.3 percent of the gross ex-vessel revenue from the retained groundfish catch in the BSAI and GOA groundfish fisheries and almost 1 percent of the gross revenue from the resulting seafood products after primary processing. The cost of the Observer Program paid for by NMFS is about $3.4 million. This includes $3.1 million for the Observer Program Office and approximately $0.3 million for General Counsel and Enforcement, combined.

Estimates of the observer deployment days and costs to the industry by vessel category and for shoreside processing plants for 1999 and 2000 are presented in Table 3.1. Estimates of the cost as a percent of ex-vessel revenue by catcher vessel category and estimates of the cost as a percent of the gross product revenue by type of at-sea processor and for shoreside processors are in Table 3.2.

There would continue to be cost to the industry in addition to the out of pocket costs for observers. There are the costs associated with the fishing time lost to pick up and return an observer. For some vessels, there are also the opportunity costs associated with providing bunk space for an observer and having additional constraints on the operating capabilities. The opportunity cost of the bunk can be lost catch, production, and revenue if a crew member has to be displaced (i.e., left in port). These opportunity costs to individual vessels are to some extent offset for the fleet as a whole, because in a fishery that is constrained by a TAC or PSC limit, the catch, production, and revenue that is lost by one vessel is made up, at least in part, by the rest of the fleet. Estimates of these other costs for individual vessels or for the groundfish fishery as a whole are not available.

The widespread support for the Observer Program among the stakeholders in the BSAI and GOA groundfish fishery, suggests that the Alternative 2 or 3 would result in net benefits to various groups of stakeholders and to the Nation, as a whole.

3.3 Alternative 3: Extend the Current Observer Program through 2007

This alternative would extend the current Observer Program regulations through December 31, 2007. The regulations would be expected to be amended during the next five years as necessary to maintain or increase the effectiveness and efficiency of the Observer Program through and beyond the end of 2007. Therefore, the Observer Program would continue to provide critical information for the conservation and management of groundfish, other living marine resources, and their habitat. The groundfish management regime, that was developed based on the assumption that the Observer Program will continue to provide critical information, could continue to operate without the fundamental changes that would be required if the Observer Program were eliminated. The principal difference between Alternatives 2 and 3 is that Alternative 3 would not eliminate the administrative burden of rulemaking to extend the Observer Program authority in five years. In the past, the Council has advocated expiration dates for the Observer Program under the premise that these dates provide an incentive to NMFS and the Council for making desired changes to the program. In reality, expiration dates create an emergency mode for rulemaking to extend the program if complex legal or procedural issues have not been adequately ferreted out or implemented within a time frame prior to expiration of the program. However, if other changes are expected to be made to the Observer Program regulations before 2007, the rulemaking required for those changes could extend the program beyond 2007 and perhaps indefinitely. In that case, there would be no additional rulemaking burden with Alternative 3 and, therefore, there would be little real difference between Alternatives 2 and 3.

Table 3.1 Numbers of vessels and plants with observers, observer deployment days, and estimated observer costs ($1,000) by year and type of operation, 1999 and 2000.

	1999			2000		
	Count	Obs. Days	Cost	Count	Obs. Days	Cost
Catcher vessels						
Hook and line						
60-124	47	894	312.90	46	902	315.70
>124	1	11	3.85	2	17	5.95
H&L total	48	905	316.75	48	919	321.65
Pot						
60-124	55	711	248.85	59	864	302.40
>124	20	254	88.90	20	244	85.40
Pot total	75	965	337.75	79	1,108	387.80
Trawl						
60-124	98	3,552	1,243.20	106	4,272	1,495.20
>124	31	4,096	1,433.60	30	4,336	1,517.60
Trawl total	129	7,648	2,676.80	136	8,608	3,012.80
Catcher-vessel total	252	9,518	3,331.30	263	10,635	3,722.25
Catcher/processors						
Hook and line						
60-124	12	1,660	581.00	12	1,847	646.45
>124	25	5,585	1,954.75	26	6,474	2,265.90
H&L total	37	7,245	2,535.75	38	8,321	2,912.35
Pot						
>60	8	368	128.80	9	426	149.10
Pot total	8	368	128.80	9	426	149.10
Fillet trawler						
>124	4	1,154	403.90	4	1,195	418.25
H&G trawler						
60-124	9	840	294.00	9	860	301.00
>124	15	4,089	1,431.15	15	4,532	1,586.20
Surimi trawler						
>124	11	3,495	1,223.25	11	3,996	1,398.60
Trawl total	39	9,578	3,352.30	39	10,583	3,704.05
Catcher/processor total	84	17,191	6,016.85	86	19,330	6,765.50
Motherships	3	490	171.50	5	985	344.75
Other vessels	16	485	169.75	11	886	310.10
All vessels	355	27,684	9,689.40	365	31,836	11,142.60
Shore plants	20	3,166	1,108.10	27	4,522	1,582.70
Grand totals	375	30,850	10,797.50	392	36,358	12,725.30

Table 3.1 Continued.

Vessels that operated exclusively in the BSAI

	1999			2000		
	Count	Obs. Days	Cost	Count	Obs. Days	Cost
Catcher vessels						
Pot						
60-124	21	283	99.05	16	312	109.20
>124	18	234	81.90	14	169	59.15
Pot total	39	517	180.95	30	481	168.35
Trawl						
60-124	25	825	288.75	44	1,950	682.50
>124	6	641	224.35	28	4,073	1,425.55
Trawl total	31	1,466	513.10	72	6,023	2,108.05
Catcher-vessel total	70	1,983	694.05	102	6,504	2,276.40
Catcher/processors						
Hook and line						
>124	10	1,931	675.85	19	4,393	1,537.55
H&L total	10	1,931	675.85	19	4,393	1,537.55
Pot						
>60	-	-	-	6	295	103.25
Pot total	-	-	-	6	295	103.25
Fillet trawler						
>124	4	1,154	403.90	4	1,195	418.25
H&G trawler						
60-124	3	180	63.00	4	326	114.10
>124	4	1,093	382.55	-	-	-
Surimi trawler						
>124	11	3,495	1,223.25	11	3,996	1,398.60
Trawl total	22	5,922	2,072.70	19	5,517	1,930.95
Catcher/processor total	32	7,853	2,748.55	44	10,205	3,571.75
Motherships	3	490	171.50	4	905	316.75
All vessels	105	10,326	3,614.10	150	17,614	6,164.90

Table 3.1 Continued.

Vessels that operated exclusively in the GOA

	1999			2000		
	Count	Obs. Days	Cost	Count	Obs. Days	Cost
Catcher vessels						
Hook and line						
60-124	27	426	149.10	24	369	129.15
H&L total	27	426	149.10	24	369	129.15
Pot						
60-124	11	118	41.30	19	240	84.00
>124	-	-	-	3	36	12.60
Pot total	11	118	41.30	22	276	96.60
Trawl						
60-124	22	559	195.65	32	860	301.00
Trawl total	22	559	195.65	32	860	301.00
Catcher-vessel total	60	1,103	386.05	78	1,505	526.75
All vessels	60	1,103	386.05	78	1,505	526.75

Note: The cost estimates are based on an estimated average cost per day of $350. This includes the payment to observer providers and the cost of transportation and board.

Source: NMFS Observer Program, CFEC fish tickets, weekly production reports, Alaska state and Federal vessel-registration files. National Marine Fisheries Service, P.O. Box 15700, Seattle, WA 98115-0070.

Table 3.2 Observer costs as a percent of ex-vessel revenue for catcher vessels and as a percent of gross product revenue for at-sea processors by vessel type and length, 1999 and 2000.

	Min. %	Max. %	Avg. %	Wt. Avg. %
Year/Vessel Type/Length				
1999				
Longline catcher vessels				
60-124	.6	12.2	2.2	2.0
Pot catcher vessels				
60-124	.8	20.5	4.9	2.7
>124	1.1	16.8	5.4	3.4
Trawl catcher vessels				
60-124	.3	9.9	2.0	1.5
>124	.8	5.6	2.7	2.4
Longline catcher/processors				
60-124	.8	3.1	1.9	1.8
>124	1.1	6.4	2.3	2.0
Pot catcher/processors				
>60	.8	3.7	1.8	1.4
Fillet trawl processors				
>124	-	-	.6	.6
H&G trawl processors				
60-124	.3	2.8	1.0	1.0
>124	1.0	2.9	1.4	1.3
Surimi trawl processors				
>124	.4	.5	.4	.4
Motherships				
>124	-	-	.3	.3
2000				
Longline catcher vessels				
60-124	.4	3.7	1.4	1.3
Pot catcher vessels				
60-124	.5	16.4	3.7	2.9
>124	1.3	5.2	3.1	2.9
Trawl catcher vessels				
60-124	.1	4.4	1.6	1.2
>124	.8	4.2	2.2	1.9
Longline catcher/processors				
60-124	1.2	4.4	2.0	1.8
>124	1.2	5.4	2.4	2.1
Pot catcher/processors				
>60	1.4	3.7	2.2	2.2
Fillet trawl processors				
>124	-	-	.9	.6
H&G trawl processors				
60-124	.4	2.5	1.1	.9
>124	1.0	2.2	1.3	1.3
Surimi trawl processors				
>124	.4	.7	.5	.5
Motherships				
>124	-	-	.7	.5

Table 3.2 Continued.

Vessels that operated exclusively in the BSAI or the GOA by area

	Min. %	Max. %	Avg. %	Wt. Avg. %
Year/Area/Vessel Type/Length				
1999				
BSAI				
Pot catcher vessels				
60-124	.8	20.5	8.1	5.4
>124	1.1	16.8	5.4	3.7
Trawl catcher vessels				
60-124	.8	6.6	2.1	1.5
>124	1.0	2.5	1.6	1.4
Longline catcher/processors				
>124	1.1	6.4	2.4	1.8
Fillet trawl processors				
>124	-	-	.6	.6
H&G trawl processors				
60-124	-	-	.8	.7
>124	-	-	1.2	1.2
Surimi trawl processors				
>124	.4	.5	.4	.4
Motherships				
>124	-	-	.3	.3
GOA				
Longline catcher vessels				
60-124	.6	11.8	1.9	1.5
Pot catcher vessels				
60-124	1.1	6.0	2.0	1.5
Trawl catcher vessels				
60-124	1.1	9.9	2.7	2.1

Table 3.2 Continued.

Vessels that operated exclusively in the BSAI or the GOA by area

	Min. %	Max. %	Avg. %	Wt. Avg. %
Year/Area/Vessel Type/Length				
2000				
BSAI				
Pot catcher vessels				
60-124	1.0	16.4	5.6	4.5
>124	1.3	5.2	2.9	2.7
Trawl catcher vessels				
60-124	.1	3.3	1.2	1.0
>124	.8	4.2	2.2	1.9
Longline catcher/processors				
>124	1.2	5.4	2.4	2.1
Pot catcher/processors				
>60	1.4	3.7	2.4	2.4
Fillet trawl processors				
>124	-	-	.9	.6
H&G trawl processors				
60-124	-	-	.9	.6
Surimi trawl processors				
>124	.4	.7	.5	.5
Motherships				
>124	-	-	.8	.5
GOA				
Longline catcher vessels				
60-124	.4	4.9	1.3	1.3
Pot catcher vessels				
60-124	.5	5.7	2.6	2.0
>124	-	-	3.2	3.1
Trawl catcher vessels				
60-124	.8	4.4	2.1	1.8

Note: The cost estimates are based on an estimated average cost per day of $350. This includes the payment to observer providers and the cost of transportation and board. The average percent (Avg. %) is the average of the percents for all vessels in a category. The weighted average percent (Wt. Avg. %) is the weighted average for all vessels in a category. It is the total observer cost for all vessels in a category as a percent of the total ex-vessel or gross product revenue of all the vessels in that category.

Source: NMFS Observer Program, CFEC fish tickets, weekly production reports, Alaska state and Federal vessel-registration files.
National Marine Fisheries Service, P.O. Box 15700, Seattle, WA 98115-0070.

3.4 Option 1 for Alternatives 2 and 3: Increase NMFS' Management Controls over Observer Providers and Observers

Due to the critical conservation and management uses of information generated by the Observer Program, improving the quality of that information is a priority for NMFS. The regulatory changes included in Option 1 are intended to partially address the problems identified with the current service delivery model. Specifically, these changes are intended to address the fact that although the observer providers and observers play key roles in providing information from the BSAI and GOA groundfish fisheries, they may have incentives that would tend to decrease the quality of the information provided by the Observer Program.

Option 1 would: (1) Change the observer certification and decertification process to ensure that it is compliant with the APA; (2) Change the observer certification criteria and standards of behavior to clarify and strengthen these regulations; (3) Replace the observer provider (contractor) certification and decertification process with an APA compliant permitting process similar to that used for other NMFS Alaska Region permits; and (4) Change the duties and responsibilities of observer providers in order to eliminate ambiguities and to strengthen the regulations governing the relationship between NMFS and the observer providers.

The elements of Option 1 were identified in Section 2.4. The problem being addressed and the expected effects of the various elements of Option 1 are discussed in this section.

Although many proposed changes to the Observer Program regulations are included in Option 1, the Council/NMFS can select or reject each proposed change. The following analysis provides a comparison between the status quo and each proposed change to the status quo. Therefore, the analysis addresses both the status quo and the proposed change for each element of the Observer Program regulations addressed by Option 1. In some instances sub-options are identified and analyzed.

3.4.1 Change the observer certification and decertification process to ensure that it is compliant with the APA

Problem 1: The current system of observer certification and decertification has several areas which raise concerns about its adequacy under the APA.

Solution 1: Change the observer certification and decertification process to ensure that it is compliant with the APA as follows:.

The observer certification process needs to be formally established through regulation. Rulemaking should address the following:

1. By current regulations, certification ends after each deployment. It is proposed that the observer certification would be valid indefinitely, unless it is rescinded by the agency or unless the observer is inactive for more than 18 months. Observers will have to meet any training needs, such as the annual 4-day and 1-day briefings, CDQ training, and CDQ briefing, prior to each deployment.

2. A process needs to be established through regulation whereby an application for observer certification is reviewed and certification is either approved or denied. A formal appeals process

needs to be in place to deal with denials.

3. An applicant who is initially denied certification must have appeal rights that are compliant with the APA. This may ultimately result in the appeal being made to the Alaska Region Office of Administrative Appeals (OAA). The process currently being used by the OAA for permit applications is APA compliant. The OAA's decision will be the Agency's final decision, unless the Science and Research Deputy Director for the Alaska Region modifies the OAA's decision.

4. Two sub-options are proposed regarding the application requirement for currently certified observers:
   (i) they would have grandfather rights and would not have to reapply or
   (ii) they would not have grandfather rights and would have to reapply.

The suspension/decertification process is currently laid out through regulations. Concerns have been raised about its adequacy under the APA. Several areas for improvement have been identified through coordinated efforts between the Observer Program Office (OPO) and NOAA General Counsel.

1. Some recommended improvements can occur through internal changes to OPO procedures, and do not require additional rulemaking. Examples of these changes are internal operation time lines for addressing and finalizing decertification, administrative recordkeeping, and training for staff.

2. When the Observer Program Office makes the initial Agency decision to suspend or decertify an observer, the observer has the right to appeal that decision. The Appeals Officer has resided in the OPO. Changes are needed to establish the OAA as the Observer Suspension and Decertification Appeals Official. This would remove potential bias, improve fact finding capabilities, and ensure the application of legal standards. The OAA's decision will be the Agency's final decision, unless the Science and Research Deputy Director for the Alaska Region modifies the OAA's decision.

3. The penal system would remain an option for General Counsel and NMFS Enforcement to use in the case of criminal violations such as fraud.

Effects 1:

Observer Providers - This action should have minimal effects on observer providers.

Observers - Overall, this system will improve the current process by providing a level of appeal removed from the Observer Program.

Industry - This action should have minimal effects on the industry.

NMFS - NMFS will need to allocate some Observer Program staff resources to process applications for certification. In addition, there will be a transfer of responsibility for handling appeals of decisions from the Observer Program to the OAA and this will require some re-allocation of their time. At this time, appeals are rare and we anticipate the workload will be minimal. The net result

will be that NMFS should better be able to defend any administrative actions related to certification or decertification of observers.

Discussion of observer appeals through the Office of Administrative Appeals (OAA) versus an Administrative Law Judge (ALJ)

Presently, the program has an in-house decision-making system for suspension and decertification of observers. This system is established in the regulations. It falls short of minimum APA and due process standards, however, and does not provide as fair a decision-making process as it needs to.

The agency has two APA-compliant determination systems from which to choose. Violations of agency regulations are handled through the enforcement process, which uses an Administrative Law Judge (ALJ). An alternative system, potentially available within the Alaska Region, is the Office of Administrative Appeals (OAA) in Juneau.

The OAA has three Appeals Officers and an Appeals Specialist who handle appeals from the Alaska Region's Restricted Access Management (RAM) program concerning the denial of fishing permit applications. The Appeals Officers are all experienced lawyers with special training and skills in conducting hearings, evaluating evidence, and writing administrative law decisions.

The OAA is independent of RAM, both physically and organizationally, in order to maintain both the appearance and reality of a fair, unbiased, and ethical decision-making process. The OAA office is housed in a separate building more than a mile from the RAM office. The OAA is under the general supervision of the Deputy Regional Administrator, but appeals decisions are rendered through the independent judgment of the Appeals Officers and are not subject to review by the Regional Administrator until after they have been published.

The OAA has handled more than 300 appeals since 1995. Approximately 25 percent of OAA's decisions have granted relief to appellants. To date, the Regional Administrator has not reversed an OAA decision. Only 11 decisions of the OAA have been appealed to the federal courts; of these, only one has been reversed. The federal courts have commented favorably on the fairness of the Alaska Region's appeals process and the quality of OAA's decisions.

The cost of a party appealing to OAA from RAM is minimal. Filing fees and other fees are not required, and an appellant need not be represented by a lawyer. When appropriate, hearings are conducted via teleconference to save the parties time and expense. The amount of time it takes to reach a decision varies depending on the complexity of the appeal, OAA's caseload, and other factors. Appellants are entitled to 30 days' advance notice of hearings, and appeals decisions become NMFS's final agency action 30 days after they are published, unless the Regional Administrator orders review. Due to the amount of care and attention required for each case, and the time it takes to write a considered decision, it may take six months or longer to reach a decision. The expense of appealing an OAA decision to federal court is high and can easily cost thousands of dollars, even tens of thousands of dollars.

The other APA-compliant system is the Administrative Law Judge (ALJ) system ~~established by NOAA regulations~~. Administrative Law Judges are an independent corps of judges selected through competitive examination administered by the federal Office of Personnel Management in Washington,

D.C. ALJs must have a minimum of seven years' experience as a judge, hearing officer, or attorney participating in litigation or administrative law proceedings. They are paid on a separate scale comparable to the Senior Executive Service. In most respects, ALJs perform tasks that are very similar to the Appeals Officers in the OAA. The level of training and experience of OAA Appeals Officers is at least comparable to that of ALJs, while the Appeals Officers have more expertise than ALJs in non-enforcement fisheries-related issues.

One difference between the two systems is that ALJ hearings are somewhat more formal and time-consuming than OAA hearings. NOAA attorneys participate in the ALJ hearing process on behalf of the agency, whereas NMFS is unrepresented at OAA hearings. Another difference is that at this time there are no ALJs who are NMFS or NOAA employees. In the context of enforcement, NOAA contracts with the U.S. Coast Guard for ALJ services. The USCG ALJs handle hearings arising out of civil administrative enforcement proceedings instituted by General Counsel for Enforcement and Litigation (GCEL). NOAA must pay for the ALJ's costs, including time and travel expenses. The ALJs must travel to Anchorage and other places from Seattle or other sites in the U.S. Thus, ALJ proceedings impose a higher cost and greater burden on NOAA resources and personnel that OAA appeals.

A key difference in the two systems is that NOAA's ALJ system is presently used for civil prosecutions for violations of NOAA regulations, whereas OAA appeals deal with denials of permit applications. Pursuant to statute and NOAA's procedural regulations, ALJs have the authority to impose significant monetary penalties and permit sanctions assessed against persons and entities subject to regulations promulgated by NOAA, while OAA cases review and determine whether fishermen properly qualify for permits, licenses, Individual Fishing Quotas, transfers, or other fishing rights or privileges. OAA does not impose sanctions, but grants relief by requiring NMFS to issue the appropriate permits, licenses, etc. In both types of cases fishermen may have substantial financial interests at stake, and an adverse decision can have significant, long-term effects on their livelihood. Both types of cases often involve complex issues and facts, voluminous records, and testimony by laymen and experts on a wide range of topics related to the fishing industry.

The OAA is a more appropriate system for providing an APA-compliant appeals system to the observers. Observers suspension or decertification cases do not require the formal, adversarial decision-making process afforded by the ALJ system. Their issues will involve performance-related matters that are typically resolved on paper with documents as the supporting or non-supporting evidence, though they could require witness testimony. Some observers will involve behavior-related issues, such as non-compliance with the drug and alcohol policies established for observers and allegations of fraud.

Typically, observers are not careerist in the field and do not use the observer job as a permanent livelihood. Rather, they use the job as an opportunity for advancement in the field. Their need for the more formal ALJ system is lower than that of other parties on a relative scale. Their need, instead, is for quicker resolution of their appeals and simpler procedures for pursuing their appeals. Furthermore, their cases result in decertification or suspension, not fines.

As noted above, the OAA is located in Juneau, while the ALJs may or may not be located in proximity to the Observer Program in Seattle for purposes of hearing cases. Coast Guard ALJs are headquartered in Baltimore, Maryland, and are assigned by that office. Proceedings in the ALJ

system would require more direct involvement during appeals by personnel of the Observer Program and possibly NOAA General Counsel, and would be more costly and time-consuming for the agency.

Discussion of the grandfather sub-options for observers

There are about 400 certified observers. Theoretically, their certifications absolutely expire on December 31, 2002, because this is when the agency's authorization to establish the present observer deployment model expires. While there is an absolute expiration date, according to the regulations certifications expire at the end of each deployment. In reality, observers are recertified when they complete their debriefing and prior to their next deployment. So, an observer's certification could theoretically expire several times a year based on how many deployments and debriefings they complete annually. With Option 1, their certifications would be valid indefinitely, unless it is rescinded by the agency or unless the observer is inactive for more than 18 months

If Option 1 is put in place starting in 2003, anyone receiving certification at the commencement will be considered so certified for an unspecified period of time and with no expiration date. At the commencement of the new regulatory system, the program could simply grant the existing observers the new certification. The program has the authority to "grandfather" the observers as a whole and make them immune from any additional qualification criteria that is attached to the new regulatory scheme. So, for example, if the program required all observers to have a "B" average in their undergraduate training and an observer fell under that threshold, the OPO could by-pass application of the new criteria to the observer. If the fact that the observer did not have a B average became a factor later that the OPO felt needed enforcement, it would not be fair to later decertify the observer. So, if the regulations grandfather observers, it could easily be waiving an opportunity to later make certain standards an issue and a reason for decertification. This is not to say, however, that the OPO cannot decertify observers for other violations of standards. Certainly NMFS will be able to enforce violations that occur after January 1, 2003, but it may have difficulty enforcing violations that occur prior to January 1, 2003, but which are discovered after the grandfathering becomes effective.

All certifications will expire absolutely on December 31, 2002, therefore, NMFS could use the expiration as an opportunity to examine each observer for their compliance with the performance standards. Should there be any observers who have pending suspensions and decertifications, NMFS will need to provide them with the new APA-compliant system. The reality, however, is that these pending actions on December 31, 2002, should effectively end. The authority for the actions–to the extent they are not APA-compliant--will expire. Accordingly, NMFS will need to anticipate that as a practical matter, all pending suspension and decertification actions against observers are going to be unauthorized. NMFS will have to make an effort to resolve all pending actions prior to December 31, 2002, if it wishes to grandfather observers whose actions are proceeding inside the OPO (this does not include the APA-compliant ALJ procedure).

While NMFS is evaluating each observer, the observers would operate under a *Interim* certification. This interim certificate would allow them to continue their duties, subject of course to the new regulation standards and APA system. The OPO would issue the interim certificates to all observers who the existing administrative record reflects would have been in good-standing with NMFS on December 31, 2002. The OPO would review its records for each observer and should one reflect non-conformance with the rolled-over regulations or any new regulations, the OPO would initiate proceedings to determine if the candidate is fit to receive final and full certification. Should an

observer show lack of fitness or fulfillment of qualifications, they would be given an opportunity to show fitness or show how they can conform or meet the standards. To the extent the observer cannot meet the criteria, they would be issued a determination that they are denied a full certificate and notified of when the interim expires. Notice of appeal rights would be given and they likely would receive an extension of their interim certificate until the appeal is resolved and a final order issued. The interim certificates could be valid for a fairly extended period of time depending on how long the OPO reasonably needs to conduct its review.

Any new applicants for observer certification submitting applications after January 1, 2003, would be fully subject to the new regulatory scheme and would not receive interim certificates under the circumstances described above. Not grandfathering observers would give the new applicants at least some degree of confidence that they are not being treated unequally by NMFS or are expected to perform more rigorously than their grandfathered counterparts.

As a policy matter, it would seem that grandfathering, too, may be seen as forgiveness for past poor performance. Should any observer who is grandfathered be on shaky ground with NMFS on January 1, 2003, grandfathering them would be a lost opportunity to cure the fault and a positive reinforcement of poor performance.

A drawback to not grandfathering is the bureaucratic impact of the application and review process. It will require human and computer resources to generate the interim certificates, review the record on each observer, and then correspond with those who NMFS determines do not meet the performance standards.

3.4.2 Change the observer certification criteria and standards of conduct to clarify and strengthen these regulations

Some of the following changes principally are intended to clarify the standards of behavior in order to help ensure that they provide clear guidance to observers and can be used as a basis for suspending or decertifying an observer. The legal issue addressed by such changes is not strictly an APA compliance issue, it is a more generic due process issue. Other changes are proposed principally to address non-legal issues. They are intended to extend the certification criteria and standards of behavior in order to decrease problems that are not addressed adequately by the existing regulations. Finally, there are a few changes that address both legal and non-legal issues. The principal issue being addressed by each proposed change is identified as a legal, non-legal, or legal/non-legal issue.

Problem 1 : The existing regulations do not prohibit someone with a past criminal record from becoming an observer. While the fact that someone has a criminal conviction does not mean that they will commit another offense, it is an indicator in determining whether a person poses a greater risk to others, themselves or may be unable to furnish credible data. The program and the observer providers carry a responsibility to the vessel, their crew, observers and other fisheries personnel, to ensure that observers do not pose particular risks. This is especially a concern since the observers are imposed on vessels and the industry; certified observers in the NPGOP are not invited aboard fishing vessels or into processing plants or allowed aboard voluntarily. People with criminal histories are a category of persons that carry a higher probability of risk to others. Depending on the nature of the crime, conviction history can portend future behavioral issues.

Restricting certification or licensing to persons free of criminal history is not a new idea. In many fields and professions that are licensed, criminal histories act as an exclusion or disqualification. For observers, not only is criminal history a relevant consideration for their ability to provide accurate, reliable data, the program should not knowingly certify individuals who have behavioral issues that place others at risk aboard sea-going vessels, remote processing facilities and other observers who share tight quarters and housing. (Non-legal issue)

Solution 1a:

An addition would be made to the observer certification criteria so that an individual who has been convicted of a felony would not be eligible to be certified as an observer. Felonies are generally distinguished in law from minor offenses by the serious nature of the offense and the level of punishment (e.g., imprisonment lasting more than one year). Persons with felony convictions have, as a class, presented a higher risk of greater harm to persons and property when compared to individuals with misdemeanor criminal histories. For felony offenses where the person engaged in reckless conduct, the degree of risk they ignored is higher and means they could be individuals who exhibit careless behavior under circumstances where heightened awareness is essential. Felony offenses also include sexual misconduct. When observers are both male and female and they cohabitate at observer provider housing in remote locations, the potential for sexual assault or misconduct is higher.

Solution 1b:

An addition would be made to the observer certification criteria so that an individual who has been convicted of a crime of dishonesty would not be eligible to be certified as an observer. Examples of crimes of dishonesty are: fraud, forgery, extortion, embezzlement, and theft, such as the use of a stolen credit card.

Effects 1a:

Observer Providers - A very slightly reduced labor pool will result, and observer providers will have the responsibility to screen for this past activity most likely through the addition of a question to the observer application form. It should be noted however, that observer providers do not have the ability to conduct criminal background checks, and therefore would have to rely on the honesty of observer candidates when answering this question on an application form.

Observers - An unknown number of potential observers would be prohibited from employment.

Industry - The fishing industry will have greater assurance that the individuals collecting data will report honestly and not be a threat to vessel and plant personnel.

NMFS - NMFS will have improved assurance that the observer is of high caliber and free from a past felony record which could raise questions about the integrity of the data they submit. It should be noted however, that the NMFS Observer Program does not have the ability to conduct criminal background checks, and therefore would have to rely on the honesty of observer candidates when answering this question on an application form. NMFS Enforcement does have the ability to conduct criminal background checks, but the ability to use any information from a criminal background check

is highly restricted and probably could not be used as a screening tool for observer candidates. If an individual is found to have a conviction after they were certified, they could be decertified at that point. While NMFS' inability to research criminal history at the time of application for observers may appear to be a flaw in instituting this measure, the policy concern that NMFS *not knowingly certify someone who has a criminal conviction* is supported even if NMFS cannot realistically research criminal backgrounds.

Effects 1b: The effects are the same as number (1a) with the focus on the definition of crimes of dishonesty instead of felonies. A conviction for a crime of dishonesty reflects an individual's state of mind with respect to the ability to be truthful and honest. For courts, a conviction for a crime of dishonesty is particularly useful in ascertaining the veracity of a witness and weighing credibility. Crimes of dishonesty reflect whether someone has a propensity to be dishonest and commit a fraudulent act. This is particularly a concern for the need for submission of reliable data. So, this category of offenses is particularly relevant to data integrity. Furthermore, since crimes of dishonesty include theft and robbery, a conviction reflects the individual has wrongfully taken property. For a vessel owner or other observers, a thief can present a risk to valuable property. This category of offenses would include both misdemeanor and felony level convictions unlike option 1a above. Both misdemeanor and felony offense should be included under the crimes of dishonesty standard since a dishonest state-of-mind is reflected equally by both offenses. Nothing is gained or lost by including misdemeanors and felonies under the category.

Problem 2: The language in the regulatory language of Standards of Behavior (A) is poorly worded. (Legal issue)

Solution 2: Modify existing language as follows:

Observers must ~~diligently~~ perform their assigned duties as described in the Observer Manual or other written instructions from the Observer Program.

Effects 2:

Observer Providers - This regulatory change applies to the observers' standards of behavior and does not directly effect observer providers. It indirectly effects observer providers because poor performance on the part of their employees reflects negatively on the overall performance of the observer provider and because some observers may be decertified for continued poor performance.

Observers - The clarification of this standard of behavior should be helpful to the observers. They can rest-assured that if they follow the sampling directions in the Observer Manual and any other written instructions from NMFS, they will receive a good evaluation of their work during debriefing.

Industry - If observers do a better job of following the sampling directions given to them by NMFS, the quality of their data will increase and the overall management of the fishery would improve.

NMFS - Again, as observers turn their attention to the Observer Manual and other written directions supplied to them by NMFS, they will collect higher quality data which will further the mission of the Observer Program.

Problem 3: Current regulations addressing observer standards of behavior state: (Legal issue)

Observers must refrain from engaging in any illegal actions or any other activities that would reflect negatively on their image as professional scientists, on other observers, or on the Observer Program as a whole. This includes, but is not limited to:

(1) Engaging in excessive drinking of alcoholic beverages;

(2) Engaging in the use or distribution of illegal drugs; or

(3) Becoming physically or emotionally involved with vessel or processing facility personnel.

However, (1) Misuse of alcohol and drugs by observers is an ongoing problem. (2) The current standard of behavior for observers dealing with illegal drugs covers use and distribution of drugs but does not include possession. NMFS feels that possession of illegal drugs should also be a violation of the standards of observer behavior. (3) The third standard of observer behavior is difficult to enforce because of its wording. It is difficult to define "emotionally involved".

Solution 3: The following changes would be made to Standards of Behavior (D):

Observers must refrain from engaging in any illegal actions or any other activities that would reflect negatively on their image as professional scientists, on other observers, or on the Observer Program as a whole. This includes, but is not limited to:

(1) ~~Engaging in excessive drinking of alcoholic beverages~~ Violating the observer drug and alcohol policy established by the Observer Program;

(2) Engaging in the use, possession, or distribution of illegal drugs; ~~or~~

(3) ~~Becoming physically or emotionally involved~~ Engaging in sexual relations with ~~vessel or processing facility~~ personnel of the vessel or processing facility to which the observer is assigned, or with any vessel or processing plant personnel who may be substantially affected by the performance or nonperformance of the observer's official duties.

Effects 3:

Observer Providers - (1) The observer providers may need to alter their existing policies to come into compliance with Observer Program policy on drug and alcohol use by observers. (2) Some observer providers' drug and alcohol policies will have to be amended to include the possession of illegal drugs as a violation of their policy. (3) Clarifying this part of the observer standards of behavior should be welcomed by the observer providers, since they need to understand the level of professional conduct that NMFS expects of their observers.

Observers - (1) A NMFS standard will ensure consistency between the observer providers for the observers. (2) Possession of illegal drugs is a violation of Federal and State laws, therefore observers should not be surprised that it will also become a violation of the observer standards of behavior. (3) Like observer providers, it is important that observers clearly understand the expectation of NMFS

in regard to their professional conduct. Therefore, further clarifying this standard of conduct should be welcomed by observers.

Industry - (1) Since the U.S. Coast Guard has strict, zero-tolerance regulations concerning illegal drugs aboard fishing vessels and since many "dry" vessels have strict "no alcohol" rules, observer drug and alcohol policies exist, in part, to protect the fishing industry which must house observers while they are doing their work. The NMFS minimum standards will ensure consistency among all observer providers. (2) Again, this change in the observer standard of behavior will aid the fishing industry, since it will help to protect ship captains from the discovery of illegal drugs onboard their vessels during U.S. Coast Guard inspections. (3) It is important that the fishing industry also understand the expectations of NMFS regarding the behavior of observers. Clarifying the observer standard of behavior dealing with sexual relations between observers and vessel or processing facility personnel, will aid in this regard.

NMFS - (1) NMFS will work closely with observer providers, union, and observers to develop an appropriate drug and alcohol policy for observers which is reasonable and practical for the observer providers to implement, given logistical considerations. NMFS will monitor and enforce applicable regulations. (2) NMFS feels that possession of illegal drugs should be treated the same as use or distribution of illegal drugs, therefore the regulatory change will reflect this viewpoint. In addition, other Federal and State laws prohibit the possession of illegal drugs, therefore this amendment to the NMFS' observer standard of behavior will create more consistency in Federal regulation. (3) A more clearly written and enforceable standard of observer behavior will aid NMFS in striving to maintain a highly qualified and professional observer corps that can successfully perform the duties of observers.

NMFS has drafted a strawman policy which could be used as the starting basis for developing consensus with the union, observers and observer providers. The draft policy being considered could include:

Alcohol use. Prohibit observers from consuming alcohol while on duty. Also consider prohibiting them from consuming alcohol four hours prior to going on duty.

Illegal drugs. Prohibit observers from the use, possession, or distribution of illegal drugs at any time while serving under contract with a NMFS certified observer provider.

In addition, observer providers could be prohibited from knowingly allowing observers to consume alcohol while on duty. Observer providers or observer provider representatives could also be prohibited from allowing an observer who has consumed alcohol to go on duty if the observer provider or observer provider representative knows the observer has consumed alcohol within the four hours prior to going on duty.

Examples of Other Agencies Policies on Pre-duty Use of Alcohol include:

U.S. Coast Guard requirements for licenced vessel operators (49 CFR)- no alcohol 4 hours prior to going on duty;
FAA requirements for Pilots (14 CFR 121) - no alcohol 8 hours prior to going on duty;
FAA requirements for ground crew (14 CFR 121)- no alcohol 4 hours prior to going on duty;

FMCSA for commercial drivers (49 CFR 382)- no alcohol 4 hours prior to going on duty; and FRA, DOT for railway engineers and operators (49 CFR 219)- No alcohol permitted during service or 4 hours prior to service.

3.4.3 Replace the observer provider certification and decertification process with an APA compliant permitting process similar to that used for other NMFS Alaska Region permits.

Problem 1: The current system of observer provider certification and decertification has several areas which raise concerns about its adequacy under the APA.

Solution 1: Implementation of an observer provider permitting process similar to that used for other NMFS AKR permits will ensure compliance with provisions of the APA and will result in NMFS being better able to defend its decisions. Provisions include:

1. The application criteria would not be changed.

2. A new applicant seeking to become an observer provider would be required to submit an application to the Observer Program describing the applicant's ability to carry out the responsibilities and duties of an observer provider and the arrangements to be used.

3. New applicants can submit an application at any time.

4. The Observer Program Office, not the Regional Administrator, would make the initial Agency determination on whether to issue an observer provider permit based on the information submitted by applicants and on other selection criteria that are available from the Observer Program Office.

5. The application would be rated by a NMFS panel and a decision made. The process would be iterative so that an applicant has the opportunity to modify its proposal based on reviewers comments.

6. An applicant who is initially denied an observer provider permit may appeal to the Alaska Region Office of Administrative Appeals (OAA). The OAA's decision will be the Agency's final decision, unless the Regional Administrator modifies the OAA's decision.

7. An observer provider permit would be valid indefinitely unless rescinded by the agency or unless the permit expires because the observer provider is not active in deploying Observer Program observers for more than one year.

8. The enforcement of the observer provider responsibilities and duties would be in accordance with the Department of Commerce regulations under 15 CFR 904. These regulations set forth the procedures governing NOAA's administrative proceedings for assessment of civil penalties, suspension, revocation, modification, or denial of permits, issuance and use of written warnings, and release or forfeiture of seized property. The Alaska Regional Office would no longer make the initial agency determination concerning permit sanctions. Instead, NOAA General Counsel and Enforcement personnel would resolve regulatory compliance issues. However, NMFS Observer Program staff would continue to work directly with observer providers to address

problems and minimize any compliance issues.

9. Two sub-options are proposed regarding the application requirement for currently certified observer providers:
   (i) they would have grandfather rights and would not have to reapply or
   (ii) they would not have grandfather rights and would have to reapply.

Effects 1:

Observer Providers - Observer providers would see better protection of their due process rights because appeal processes will be decoupled from the Observer Program. Permit recipients would also be subject to enforcement action based on their regulatory responsibilities as a permit holder.

Observers - This action should have no effect on observers.

Industry - This action should have no effect on industry.

NMFS - NMFS should better be able to legally defend any administrative actions related to issuing or sanctioning permits. Additional enforcement and General Counsel staff resources will be needed to handle existing and any additional compliance actions with observer providers.

Discussion of observer provider appeals through the Office of Administrative Appeals (OAA) versus an Administrative Law Judge (ALJ)

In cases involving permit sanctions and monetary penalties, as opposed to initial certification, the observer providers would benefit more from the ALJ system, rather than the OAA. The ALJ system is currently used and has been for several years for agency pursuit of violations by the observer providers. Typically, today, a violation of a performance standard by an observer provider is referred to General Counsel for Enforcement and Litigation (GCEL) by the OPO or Enforcement. If GCEL determines that the evidence shows a violation, GCEL initiates civil administrative enforcement proceedings and a Notice of Violation and Assessment (NOVA) or Notice of Permit Sanction (NOPS) is issued to the provider. The NOVA or NOPS advises the provider of the alleged violation and the monetary amount of the assessment or the terms of the proposed permit sanction.

The NOVA/NOPS describes the option of the ALJ process if the provider wishes to contest the violation and proposed penalty or sanction. Providers who request a hearing will be directed to the civil procedure regulations at 50 C.F.R. Part 904 for the rules governing the agency's civil administrative enforcement proceedings. The ALJ will set up a calendar for a hearing and submission of motions and exchange of "discovery." At the hearing, witnesses can be compelled to appear, to take the stand, testify, and to be cross-examined. The ALJ considers the testimony and written evidence and issues a written opinion on the issues. The ALJ would also decide motions to dismiss or other procedural matters that may change, alter, or significantly modify the charges, or limit availability of evidence to one or both parties. The ALJ's decision is appealable to the Administrator of NOAA. The Administrator's decision is then appealable to the U.S. District Court. The OAA decisions that become the final agency action are appealable directly to the U.S. District Court.

Since observer providers would be subject to monetary penalties, and permit sanctions, it is prudent

to provide them a more formal decision-making process with respect to violations brought against them by the agency. The OAA forum does not provide as many procedural opportunities to resolve differences or reach settlements. On the other hand, the fact that ALJs will be the only forum for resolution of violations, it gives the agency the opportunity – as it has for some time – to aggressively pursue serious shortfalls in observer provider performance. In other words, NOAA can demonstrate through the ALJ forum just how serious it takes the performance or non-performance of observer provider violations. The ALJ forum is appropriate because it ensures that observer providers and the agency give serious consideration to their relationship and performance. It is a demonstration that the agency takes provider obligations and responsibilities seriously, principally because providers are a key to making the product delivery system work well.

The ALJ forum is appropriate for observer providers because any violation being considered by the agency will undergo scrutiny by GCEL before it is brought. Under the OAA system, the entire case would be handled by OPO staff and their judgment is relied upon for what is and is not an appropriate case to pursue. Presumably, with involvement by GCEL – and again, this system is already in place, operating, and used today – another layer of review is available before observer providers are charged. This functions as another "screen" against cases that have inadequate or flawed evidence or where the facts do not necessarily support the violations charged. Observer providers would benefit from one additional layer of decision-making provided by the ALJ system. Given the higher stakes for both sides, this appears to be an overall net benefit when compared to the OAA system.

Discussion of the grandfather sub-options for observer providers

With regard to grandfathering or not grandfathering the application requirement for current observer providers (i.e., sub-options i and ii, respectively), there are a number of issues to consider. Grandfathering may be seen as forgiveness for past performance. For any observer provider who is on shaky ground with the Observer Program on January 1, 2003, grandfathering them would be a lost opportunity to cure the fault and may be viewed as a positive reinforcement of poor performance. Not grandfathering observer providers would give the new applicants at least some degree of confidence that they are not being treated unequally by the Observer Program or are expected to perform more rigorously than their grandfathered counterparts. A major drawback to not grandfathering, however, is the bureaucratic impact of the application and review process. Requiring current observer providers to apply for a permit would place additional administrative burdens on the current observer providers. Not grandfathering current observer providers would also require NMFS to expend additional human and computer resources to generate interim permits, review the record on each observer provider, and then correspond with those who the Observer Program determines do not meet the performance standards.

3.4.4 Change the duties and responsibilities of observer providers in order to eliminate ambiguities and to strengthen the regulations governing the relationship between NMFS and the observer providers

As was done for the proposed changes to the performance standards for observers, the principal issue being addressed by each proposed change to the duties and responsibilities of observer providers is identified as a legal, non-legal issue, or legal/non-legal issue.

Problem 1: The regulations regarding observer provider responsibilities and duties at 50 CFR §679.50 (i)(2) need to be modified because NMFS does not expect a minimum level of minorities or

women in the observer workforce and hiring laws affecting minorities and women exist outside of these regulations, therefore a reference to minorities and women is not needed here. (Non-legal issue)

Solution 1: The following changes would be made to the items currently listed as observer provider responsibilities and duties in the regulations at 50 CFR §679.50 (i)(2):

(i) Recruiting, evaluating, and hiring qualified candidates to serve as observers~~, including minorities and women.~~

Effects 1:

Observer Providers - This regulatory wording change will clarify the regulation and make it easier for the observer providers to comply.

Observers - The rights of minorities and women to be employed as observers will still be protected under existing hiring laws of the United States.

Industry - This action should have no effect on industry.

NMFS - This regulatory wording change will clarify the regulation.

Problem 2: Regulations regarding the provision of observers have two problems: 1) There are many types of observers (i.e., ADF&G crab observers and Hawaiian longline observers) so the phrase "only observers" in the existing regulation needs clarification and 2) on occasion, observer providers will deploy an observer who is ill and cannot work for several days while they recover from their illness (e.g., flu, severe sinus or ear infection). (Non-legal issue)

Solution 2a: Modify the regulations as follows:

(ii) Ensuring that only observers with valid North Pacific groundfish observer certification provide observer services and that these observers are: 1) fit for duty at the time of embarkation, and 2) have successfully completed all NMFS required training before deployment. Fit for duty means the observer is fully capable of performing all their assigned duties.

Solution 2b: Modify the regulations as follows:

(ii) Ensuring that only observers with valid North Pacific groundfish observer certification provide observer services and that these observers are: 1) fit for duty at the time of embarkation, and 2) have successfully completed all NMFS required training before deployment. Fit for duty means if an observer is sick or injured at the time of embarkation, they must first receive a clearance to work from a licensed health professional before deployment.

Effects 2a:

Observer Providers - Some observers will temporarily remain on shore while they recover from illness. This will potentially cause a disruption in observer deployment logistics and result in added per diem and travel costs. The decision to deploy any individual would be decided between the

observer and observer provider.

Observers - Depending on the payment terms of their contract, observers may receive less pay, because they may receive a lower level of pay while their deployment is delayed and they wait on shore. Observers who remain on shore should recover more quickly from their illness because they will not be experiencing the stresses of the job.

Industry - There may be a delay in deploying an observer to a fishing vessel or shoreside plant. The additional costs of an observer's delayed deployment may result in slightly higher observer coverage costs and lost fishing time and income. However, this requirement would tend to decrease the probability that a vessel would have to return to port due to a medical emergency for an observer. It would also benefit industry by improving the data provided by observers.

NMFS - Healthy observers will provide more and better quality sampling data, resulting in better management of the fishery. NMFS will monitor the performance of observers to see if appropriate choices are being made concerning their fitness for duty.

Effects 2b:

Same as 2a, except the observers and observer providers will have the additional burden of getting a medical clearance before deploying a sick or injured observer. This takes the evaluation for fitness of duty out of the hands of the observer and observer provider and places it in the hands of a trained medical professional. While this may afford greater protections to the observer, it could also complicate the logistics of placing observers, particularly in remote sites. Only those injuries and illnesses that could reasonably be expected to effect the observers' ability to perform their duties, would require a medical clearance prior to deployment.

Problem 3: Current regulations state: (Legal/non-legal issue)

(iii) Providing observers as requested by vessels and processors to fulfill requirements under paragraphs (c) and (d) of this section.

This regulation needs clarification. Specifically, what does "as requested" mean? For instance, if a vessel owner contacts an observer provider, whom they have never worked with before, and requests that an observer be available at the dock in Cordova, in two days, and the observer provider says they have no observer available, is the observer provider in violation of this regulation?

Solution 3: Modify the regulations as follows:

(iii) Providing observers as agreed to in signed and valid contracts with its clients ~~requested by vessels and processors~~ to fulfill requirements under paragraphs (c) and (d) of this section.

Effects 3:

Observer Providers - Observer providers will not be held liable if they do not provide an observer to a client that they do not have a valid agreement with. They will not be pressured to provide observers to last-minute, call-in requesters. Many observer provider contracts contain "Force Majeure"

language that reads something like this: Observer providers shall not be liable for failure of performance if caused by war, Act of God, loss of hire, governmental acts beyond the control of the observer provider or without any fault of the observer provider. Governmental acts may include, by explanation not limitation, federal or state decisions affecting fishing inside state waters and/or the EEZ. This type of contract language will protect observer providers from being held liable when they cannot provide observer services because of conditions that are beyond their control.

Observers - The observers may have scheduling benefits from the expected increased use of contracts between observer providers and their clients.

Industry - This will encourage the fishing and processing operations to secure valid contracts for observer services well before they need the observers. It will discourage "last minute shopping" for observer services.

NMFS - This regulatory wording change will clarify the regulation thus making it more enforceable.

Problem 4: The existing regulation regarding observer salary needs clarification because enforcement of this regulation rests on a definition of "timely manner". What does "in a timely manner" mean? Since the provision of observer salary and any other benefits or services should be carried out according to the observers' contract, NMFS thought it would be best to state that clearly in the regulations. In addition, NMFS does not state what benefits or personnel services are required, so whatever is stipulated in the contract should be what is required. (Legal/non-legal issue)

Solution 4: Modify the regulations as follows:

(iv) Providing observers' salary, any other benefits and personnel services ~~in a timely manner~~ as dictated by the terms of the observers' contract or Union agreement.

Effects 4:

Observer Providers - Observer providers should have no qualms about abiding by the terms of their observer agreements. The reworded regulation clarifies what is expected and will diminish confusion and questions.

Observers - Observers should benefit from the added support of NMFS regulations to help ensure that observer providers abide by the terms of their working agreement. If they have a dispute with their observer provider over the terms of their agreement, they can turn to NMFS for help as well as the Union or other professional assistance.

Industry - This action should have no effect on industry.

NMFS - This regulatory wording change will clarify the regulation, thus making it more enforceable. This additional assistance from NMFS for observers should increase observer morale and data quality.

Problem 5: The regulation limiting deployments needs clarification. The intent of the original regulation could possibly be violated by observer providers who interrupt a 90-day groundfish

observer deployment and send the observer to work as a crab observer. For instance, this would occur if an observer worked aboard two groundfish vessels, was transferred to a crab vessel, and then worked aboard two more groundfish vessels before completing their 90-day contract and returning to debrief from the groundfish deployments. (Non-legal issue)

Solution 5: Modify the regulations as follows:

(v)(c) A deployment cannot include assignments to more than four vessels, including groundfish and all other vessels, and/or shoreside processors.

Effects 5:

Observer Providers - The extent to which this practice occurred in the past is unknown, therefore the impact of adding restrictions is unknown. The effect will probably be minimal, when occasionally an observer provider will have to remove an observer from the field before the completion of their 90-day contract, because they have reached the 4-boat limit.

Observers - Again, since the extent to which this loop-hole was used in the past is unknown, it's effect on observers is also unknown. As in the case of observer providers, the effect will probably be minimal, when occasionally an observer provider will have to remove an observer from the field before the completion of their 90-day contract, because they have reached the 4-boat limit.

Industry - Observer providers should be able to plan well in advance for this change and observers should be available when needed so the impact on industry should be minimal.

NMFS - This regulatory change will ensure higher quality data because observers will undergo a complete debriefing after four sampling assignments. Experience has shown that if observers work aboard more than four sampling platforms, they tend to forget the important details of how they did their work and the ability to edit and correct data can suffer as a consequence.

Problem 6: The regulation regarding supplying observers is not needed because the economic forces of the competitive, free-market sufficiently encourage observer providers to be prepared to replace observers as needed to meet their clients (fishing industry) needs. If an observer provider fails to do this, they lose business and suffer the economic consequences. In addition, an observer provider is required to meet the terms of a signed and valid contract to supply an observer. These are sufficient incentives, and NMFS believes it is not appropriate to have a regulation that specifies the method that observer providers will use to meet their contractual commitments. (Non-legal issue, but related to problem 3 which is in part a legal issue)

Solution 6: Delete the following regulation:

~~(vi) Supplying alternate observers or prospective observers if one or more observers or prospective observers are not approved by NMFS, fail to successfully complete observer training or briefing, are injured and must be replaced, or resign prior to completion of duties~~.

Effects 6:

Observer Providers - This action removes the unneeded threat of regulatory action. The replacement of a technical requirement with a performance standard should allow the observer providers to more efficiently meet the performance standard.

Observers - This action should have no effect on observers.

Industry - This regulation has never been enforced, so it's removal should not change the conditions of observer procurement.

NMFS - This will clarify NMFS regulations and keep them pertinent.

Problem 7: The regulations regarding sending catch messages has the following problems: (1) The words, "In cooperation with vessel or processing facility owners" are not needed in this regulation because other regulations at 50 CFR §679.50 f (1) & (2) cover both vessel and shoreside processor responsibilities regarding the transmission of observer data. (2) Directions concerning the timely transmission of data by observers are specified by the Observer Program and not the Regional Administrator. (Non-legal issue)

Solution 7: Modify the regulations as follows:

(viii) ~~In cooperation with vessel or processing facility owners, ensuring~~ Ensuring that all observers' in-season catch messages and other required transmissions between observers and NMFS are delivered to NMFS within a time specified by the ~~Regional Administrator~~ Observer Program.

Effects 7:

Observer Providers - The intent of the regulation will now be more clearly stated. This should be welcomed by observer providers because it will help to eliminate any existing confusion about the regulation. NMFS recognizes that the transmission of catch messages is mainly the responsibility of the observer, but NMFS also feels that the observers' employer shares some of that responsibility. NMFS will only hold observer providers accountable to do what can be reasonably expected of them to ensure that observer messages are sent to NMFS. This would include not reassigning an observer to another vessel until all required catch messages have been sent to NMFS.

Observers - This action does not change the observers' responsibilities so it should have no effect on them.

Industry - The action should have no real effect on industry because regulations covering their responsibility to provide assistance to the observer in transmitting data to NMFS are unchanged.

NMFS - A more cleanly written regulation will lesson questions and confusion and will allow for better enforcement of this regulation.

Problem 8: Currently, some observer data reviews are done by phone or fax. This method is problematic and unsatisfactory for some observers (especially first-time observers). (Non-legal issue)

Solution 8: Modify the regulations as follows:

(ix) Ensuring that observers complete in-person mid-deployment data reviews ~~when~~ as required, unless specifically exempted ~~required~~ by the Observer Program.

In implementing this change, NMFS will continue to exempt high-achieving, prior observers from mid-deployment data reviews and will not require in-person data reviews in some circumstances. In 2001, 36% of the observer debriefings resulted in the observer being exempted from a mid-deployment data review on their next cruise. Observer providers will know if prior observers have been exempted from a mid-deployment data review by reviewing the observer's previous evaluation. Evaluations are faxed to the observer provider at the end of each cruise.

Observer providers may request an exemption from in-person mid-deployment data reviews for observers if the observer will spend their entire cruise in a remote location where there is no access to NMFS staff. If granted the exemption, the observer would be required to complete a data review by phone or fax according to the guidelines listed in the North Pacific Groundfish Observer Manual.

Effects 8:

Observer Providers - This action will potentially create some increased logistical demands and associated cost in transporting observers to field-office sites for in-person mid-deployment data reviews. Given prior notification, NMFS will make staff available if an observer will be passing through Anchorage, Dutch Harbor, or Kodiak outside of normal office hours. Observer providers will be responsible for making arrangements for an in-person data review and ensuring observers arrive for after-hours appointments. NMFS may also make staff available in remote locations for in-person data reviews at various times of the year. NMFS will advise observer providers when and where staff will be available.

Observers - Some observers may feel added inconvenience and stress while others will appreciate the chance to talk face-to-face with NMFS staff about the problems they've been experiencing. In-person reviews may require additional travel and time away from their work, which may create a slightly greater rotation of observers among vessels, in order to accommodate the logistical schedule for in-person data reviews.

Industry - Any increased costs experienced by observer providers may be passed on to the fishing industry. This action may create a slightly greater rotation of observers among vessels in order to accommodate the logistical schedule for in-person data reviews. However, the industry would benefit from increased data quality.

NMFS - NMFS will experience an increased work-load which can be handled by existing field office staff with the pay-off of better quality data through early problem detection and correction. NMFS estimates that an additional 15 to 30 mid-cruise data reviews would occur annually in the field offices rather than via FAX or phone.

Problem 9: The current regulations regarding scheduling debriefings have several problems: (1) The current language "as soon as possible" is too ambiguous. (2) Too many observers are reporting late for their debriefing appointments and their tardiness causes a ripple-effect of delays and wasted time.

(3) The Observer Program, instead of the Regional Administrator, handles all observer debriefings. (Legal/non-legal issue)

Solution 9: Modify the regulations as follows:

(x) Ensuring that, within 5 days after the completion of an observers' deployment, observer providers contact the Observer Program to schedule a date for debriefing ~~observers complete debriefing as soon as possible after the completion of their deployment, and at locations~~ at the time and place specified by the ~~Regional Administrator~~ Observer Program, and that the observer report for their scheduled debriefing, and complete all debriefing responsibilities.

Effects 9:

Observer Providers - Observer providers may have to increase their efforts to ensure that observers make debriefing appointments in a timely manner and are not tardy for their debriefing appointments.

Observers - Observers could face repercussions from their observer provider if they are tardy in making or meeting a debriefing appointment.

Industry - This action should have no effect on industry.

NMFS - NMFS would see a lower absence and tardiness rates for observer debriefings and thus a more efficient use of staff time. In addition, the modifications will help explain more clearly what is expected.

Problem 10: Regulations regarding completion of observer data have several problems: (1) Since observer providers are not allowed to review or edit observer data, it is unreasonable to expect them to ensure "completeness". However, it is reasonable to expect them to ensure that their employees (observers) submit to NMFS all data, reports and biological samples. (2) Observers must submit their data prior to their debriefing interview, so that the debriefer can review it. Therefore, the regulations should be changed to more accurately reflect that. (Note: Observers always complete their survey prior to their interview.) (Non-legal issue)

Solution 10: Modify the regulations as follows:

(xi) Ensuring all data, reports, and biological samples from observer deployments are ~~complete and~~ submitted to NMFS at the ~~time~~ completion of the debriefing ~~interview~~ survey.

Effects 10:

Observer Providers - This change is for clarification purposes only, and does not effect the intent of the existing regulation, therefore, there will be no effect on observer providers.

Observers - Same as observer providers above.

Industry - This action should have no effect on industry.

NMFS - A better written regulation will help explain more clearly what is expected and help ensure that the expectations are met.

Problem 11: Regulations regarding monitoring observer performance have two problems: (1) Since observer providers are not allowed to examine observer data or question observers about their data collection methods, it is not reasonable to expect them to be able to ensure "satisfactory" execution of duties. However, it is important that they ensure that observers are working, and if not, (usually due to illness or injury) they are required in a separate regulation at 50 CFR §679.50 (i)(2)(xiv)(H) to report it to the Observer Program. (2) Grammatically redundant word "observers" and "observer" in current regulation. (Non-legal issue)

Solution 11: Modify the regulations as follows:

(xiii) Monitoring observers' performance to ensure ~~satisfactory~~ execution of duties ~~by observers~~ and ~~observer~~ conformance with NMFS' standards of observer conduct under paragraph (h)(2) of this section.

Effects 11:

Observer Providers - This action relieves observer providers from the burden of trying to evaluate their observers' performance during their deployment to ensure "satisfactory" completion of duties, when they are not allowed by NMFS to examine the observers' data. However, observer providers are expected to make reasonable efforts to ensure that their employees are performing their observer duties. This can be done by maintaining routine communications with their observers.

Observers - Observers will more clearly understand that NMFS is responsible for determining the quality of their data collection. Their employer (the observer provider) is only responsible for ensuring that they complete their work, and is not involved in assessing the quality of work.

Industry - This action should have no effect on industry.

NMFS - A more clearly written and enforceable regulation that reflects the true ability of observer providers to monitor their observers' performance will help ensure that observer providers monitor observer performance. Therefore, it will improve the performance of observers and the quality of the data they provide.

Problem 12: (1) In order for an individual to be better identified in the Observer Program's database, the middle name or initial of that individual is needed. (2) The Observer Program's database no longer requires social security number, but it does use date of birth to positively identify an individual. (3) Since there is often more than one briefing class held on the same date, it is important that the observer provider distinguish between classes when registering an observer for a briefing. (4) The Observer Program has an internal procedure for documenting briefing waivers and therefore does not require notification of when a briefing waiver has been granted. (Non-legal issue)

Solution 12: Modify the regulations as follows:

(xiv) Providing the following information to the Observer Program Office by electronic transmission

(e-mail), fax, or other method specified by NMFS.

(A) Observer training registration consisting of a list of individuals to be hired upon approval by NMFS and a copy of each person's academic transcripts and resume, ~~and application for observer employment~~. The list must include the person's full name (i.e., first, middle and last names), date of birth, and sex. ~~The person's social security number is requested .~~Observer briefing registration consisting of a list of the observer's full name, requested briefing class, date of class, and briefing location. ~~If the Observer Program Office has excused an observer from attending a briefing, the briefing registration must also include the names of observers excused from briefing, the date the observer was excused, and the name of the NMFS staff person granting the excuse.~~ This information must be submitted to the Observer Program Office at least 5 working days prior to the beginning of a scheduled observer certification training or briefing session.

Effects 12:

Observer Providers - The revised regulation will reflect the current registration reporting requirements for observer providers and will no longer contain out-dated reporting responsibilities. This will alleviate any confusion over regulatory requirements and observer providers will have an accurate reference to use when they have questions about their responsibilities in this area.

Observers - This action should have no effect on observers.

Industry - This action should have no effect on industry.

NMFS - The regulation will now reflect the administrative reality of observer training and briefing registration and will be more enforceable.

Problem 13: The current regulations have no deadline for submission of the certificate of insurance. (Non-legal issue)

Solution 13: Modify the regulations as follows:

(E) Copies of "certificates of insurance" that name the NMFS Observer Program ~~Task~~ Leader as a "certificate holder", shall be submitted by February 1 of each year. The certificates of insurance shall verify the following coverage provisions and state that the insurance company will notify the certificate holder if insurance coverage is changed or canceled:

(1) Maritime Liability to cover 'seamen's" claims under the Merchant Marine Act (Jones Act) and General Maritime Law ($1 million minimum).
(2) Coverage under the U.S. Longshore and Harbor Workers' Compensation Act ($1 million minimum).
(3) States Worker's Compensation as required.
(4) Commercial General Liability.

Effects 13:

Observer Providers - Observer providers should be satisfied with this change since they recommended

the February 1st deadline.

Observers - Observers will have an improved assurance that required coverage is in place.

Industry - This action should have no effect on industry.

NMFS - This provides NMFS a clear deadline when the new certificate is required. This deadline will assist NMFS in ensuring that the insurance coverage requirements are being met by all observer providers. This will help ensure that observers are consistently covered by insurance.

Problem 14: NMFS feels strongly that they should also be notified of all observer problems, including harassment, safety, code of conduct, illness and injury problems in order to identify possible patterns, evaluate the severity of any reported problems, and decide on appropriate actions. (Non-legal issue)

Solution 14: Modify the regulations as follows:

(xiv) (H) Reports of observer harassment, or any prohibited action against observers as identified in §679.7(g), concerns about vessel or processor safety, any observer illness or injury that prevents them from completing their duties, and observer performance, standards of behavior, and conflict of interest problems, must be submitted within 24 hours after the observer provider becomes aware of the problem.

To assist the observer providers in complying with this regulation, NMFS will provide direction and guidance as to the range and severity of problems that need to be reported. Existing regulations which address observer code of conduct issues and observer harassment prohibitions are referenced in Appendix D.

Effects 14:

Observer Providers - Observer providers will have to do more reporting and will need guidance from NMFS as to what level of illness and injury requires notification.

Observers - It is possible that a code of conduct violation reported to NMFS may result in the suspension and/or decertification of the observer involved.

Industry - This action should have no effect on industry.

NMFS - The Observer Program will receive notification of a broader spectrum of observer problems that could potentially affect the collection of quality observer data. This information will enable the Observer Program to take action if needed.

Problem 15: A problem exists in the conflict of interest regulations because they allow a vessel or shoreside plant owner or operator to request that a certain individual observer be placed or not be placed on their vessel or at their plant. If an observer provider responded to the request and replaced an observer upon request of the captain, the existing regulation would not have been violated. (Non-legal issue)

Solution 15: Modify the regulations as follows:

(ii) Observer providers must assign observers without regard to any preference by representatives of vessels and shoreside facilities ~~based on observer race, gender, age, religion, or sexual orientation~~ other than when an observer will be deployed.

Effects 15:

Observer Providers - This regulation will aid observer providers because they could point to the Federal regulation when asked by a client if they could get either a specific or new observer, because they don't like the one that has been assigned to their vessel or plant. The observer provider could then direct their client to NMFS and the discussion would then be between the vessel or plant operator/owner and NMFS, which is where it should be.

Observers - Observers will not be removed from vessels or refused an assignment to a vessel when the captain does not like them unless there is good reason (i.e., observer is not doing the job correctly).

Industry - Industry members will not be able to choose their observers.

NMFS - The Observer Program will be able to deal directly with vessel representatives when they are experiencing problems with an observer. This will eventually help to build better communications between NMFS and the fishing industry which will improve the working relationships among NMFS, observers, observer providers and the fishing industry. It is expected to increase data quality by decreasing the potential for a conflict of interest for the observer, observer provider, or fishing or processing operation.

Problem 16: Inconsistent and irregular interviewing of potential observer candidates creates disparity in the screening of new candidates. This also contributes to inadequate and inconsistent information about the job of observing, being provided to these candidates. (Non-legal issue)

Solution 16a:

Add the following to the current list of observer provider responsibilities and duties:

a. Observer providers must meet the requirements for an observer candidate interview specified by the Observer Program.

NMFS realizes that observer providers currently conduct interviews with potential observer candidates. NMFS would like to develop consistency in this interviewing. NMFS will work closely with the observer providers to develop appropriate minimum standards for interviewing observer candidates.

Solution 16b:

Add the following to the current list of observer provider responsibilities and duties:

a. Observer providers must furnish a NMFS produced pamphlet of information describing the observer job to all observer candidates prior to hiring.

NMFS will develop a pamphlet of standard observer job information which will be given to all observer candidates by their prospective observer employers.

Solution 16c:

Add the following to the current list of observer provider responsibilities and duties:

a. Observer providers must meet the requirements for an observer candidate interview specified by the Observer Program and must furnish a NMFS produced pamphlet of information describing the observer job to all observer candidates prior to hiring.

Effects 16a:

Observer Providers - Since all observer providers currently conduct observer candidate interviews, this will not be an additional burden on them. However, they may need to modify their interview to comply with the NMFS standard.

Observers - Observer candidates will receive the benefit of consistent, minimum job descriptions and interviews. This will aid them in deciding if they are honestly prepared for the job and they should not experience the "I didn't know what I was getting into" problem.

Industry - This regulation should help to weed-out candidates that are not cut-out for the job and will help to place new observers aboard vessels who are well informed of the working conditions of observers at sea.

NMFS - This regulation will help NMFS to ensure consistency among observer providers in interviewing observer candidates and that observer providers are doing a good job of informing potential observers about the realities of the observer job.

Effects of 16b:

The effects are similar to 16a except that the observer provider interviews will not be consistent among providers in meeting any kind of minimal standard for the interview.

Effects of 16c:

The effects are similar to 16a except that the observer candidates will be provided with a consistent, detailed description of the job in the form of a NMFS-produced observer job information pamphlet.

Problem 17: Misuse of alcohol and drugs by observers is an ongoing problem. NMFS feels strongly that observer providers need to take a more active role in solving this problem. (Non-legal issue)

Solution 17: Add the following to the regulations:

b. Observer providers must ensure that their observers meet the requirements of the observer drug and alcohol policy specified by the Observer Program.

(A draft observer drug and alcohol policy can be found in the discussion of problem 3 in section 3.4.2 above.)

Effects 17:

Observer Providers - All observer providers currently have a drug and alcohol abuse policy as part of their observer hiring agreement, however, they may need to modify their policy to comply with the NMFS standard.

Observers - This change will ensure that a consistent drug and alcohol policy is applied to all observers.
Industry - Since the U.S. Coast Guard has strict, zero-tolerance regulations concerning illegal drugs aboard fishing vessels and since many "dry" vessels have strict "no alcohol" aboard ship rules, observer drug and alcohol policies exist, in part, to protect the fishing industry which must house observers while they are doing their work. This regulation change should ensure a consistent drug and alcohol policy regardless of observer provider.

NMFS - NMFS will work closely with observer providers, union, and observers to develop an appropriate drug and alcohol policy for observers which is reasonable and practical for the observer providers to implement. NMFS will monitor and enforce any applicable regulations.

Problem 18: Observer safety is a high priority of the Observer Program. Vessels carrying observers are required under regulations at 50 CFR §679.50(f)(1)(ii) to have on board a valid Commercial Fishing Vessel Safety decal. Observers are instructed to check for the safety decal before they board the vessel, but this important task is sometimes overlooked (especially by first-time observers) in their first hours aboard a new vessel. NMFS feels that the observer providers have a important role to play in ensuring a safe working environment for their employees, and therefore should be involved in verifying that the vessel has a valid USCG safety decal. (Non-legal issue)

Solution 18: Add the following to the regulations for observer providers at 50 CFR §679.50(i)(2):

c. Observer providers must verify that the vessel has a valid USCG safety decal before placing an observer on board.

Effects 18:

Observer Providers - Additional work will be required of observer providers. However, since corresponding paperwork is given to each vessel owner upon the issuance of a safety decal, it seems logical that the observer provider could ask for a copy of this paperwork prior to agreeing to provide an observer to that vessel. This may not be the only way to verify that a vessel has a valid safety decal, but it may be one of the easiest and most verifiable methods. Another way to verify that the vessel has a valid safety decal is to simply require each observer to phone, fax, email or otherwise communicate with their employer and confirm that they have completed a safety inspection of the vessel prior to departure, which included an inspection of the vessels' Coast Guard safety decal. The

safety inspection checklist is provided to all observers and can be found in the Health and Safety section of the Observer Manual.

Observers - There will be added assurance that observers are not placed aboard unsafe vessels. Observers will still be instructed to check for the presence of a valid safety decal upon boarding a vessel, and before leaving dock.

Industry - Minimal, additional paperwork burden. Many fishing vessel owners/operators will be asked to send copies of the documentation which verifies that they have passed a recent USCG safety inspection, to their observer provider.

NMFS - Added assurance that observers are not placed aboard unsafe vessels.

Problem 19: Observers on catcher vessels delivering pollock shoreside have occasionally in the past, been unable to complete their sampling at plants because they were either immediately reassigned to other vessels upon arrival at shore or the vessel they worked aboard offloaded into a temporary holding tank at the plant and left before the holding tank was emptied. An observer's duties are complete when the vessel has finished offloading their catch and the observer has sampled that catch as it flows past the observer on a conveyor. Typically this is done as the fish enters the plant. This problem has been addressed in the past through Observer Program policy, where NMFS requested that observer providers allow observers time to complete their shoreside sampling before they were sent back out to sea. However, policy is not enforceable, and observer providers may not comply with NMFS' requests in the future, therefore NMFS feels it is necessary to move from policy request to enforceable regulation. (Non-legal issue)

Solution 19: Add the following to the regulations for observer providers.

d. Observer providers must allow observers on catcher vessels delivering pollock shoreside the time necessary to complete their sampling at shoreside plants.

Effects 19:
Observer Providers - This is currently not a problem and therefore it is anticipated that it will not have a significant effect on observer logistics. It could however, in the future, require some observer providers, in some ports such as Kodiak, during the peak of the shoreside pollock season, when fishing is good, to hire extra observers to meet the observer coverage needs of the shoreside catcher vessel fleet.

Observers - Observers should welcome this change, because this will give them the ability to complete their job to the sampling specifications expressed by NMFS (i.e., whole-haul sampling for prohibited species).

Industry - Since this is currently not a problem, it should not have a significant effect on the fishing industry. Also, depending on how well observer providers can plan ahead and anticipate the observer need at a given port during a particular time of the shoreside pollock season, there should be enough observers to meet the needs of the fleet. However, this could, in the future, increase the overall cost of observers slightly.

NMFS - NMFS will benefit from the ability to enforce a current policy. NMFS will also benefit from receiving higher quality and more complete data from the shoreside pollock fleet.

Problem 20: Sometimes observers are temporarily assigned by their observer providers to observe in other fisheries (such as the Bering Sea crab fishery), during the middle of a 90-day groundfish deployment. The change in work environment and sampling methodologies can contribute to a loss of memory concerning the details of an observers' groundfish sampling efforts when the observer is asked to complete their vessel and/or plant survey during final debriefing. (Non-legal issue)

Solution 20: Add the following to the regulations for observer providers.

e. Observer providers must ensure that their observers complete their vessel and/or plant surveys before performing other jobs or duties which are not part of NMFS groundfish requirements.

Effects 20:

Observer Providers - Those observer providers who choose to interrupt an observers' groundfish work will have to allow the observer time to complete a survey for each vessel or plant in which they have already worked. All field offices are equipped with computers for observers to use in completing their surveys. The time it takes to complete a survey depends on the location of the computer that is being used. The fastest computer time is in Anchorage, usually 1 - 3 hours per survey, followed by Kodiak (1 - 4 hours per survey) and Dutch Harbor (1 - 6 hours per survey). Computer time for completing surveys does not have to be pre-scheduled with the Observer Program. It can be done on a drop-in basis.

Observers - Observers must complete a vessel or plant survey prior to their final debriefing, so completing a survey before that time will only lighten their work load later. It will also help them to "preserve" their memory of what happened on a particular vessel or plant, which will aid them in completing their final debriefing and data check at the completion of their deployment.

Industry - This action should have no effect on industry.

NMFS - Since the vessel/plant surveys are self-instructional, they require very little assistance to complete and will not heavily impact the Observer Program field office staff. There are also ample computers available for observer use at the field offices, so a shortage of computers should not be a problem.

3.4.5 Increased Agency Costs

It is estimated that with Option 1, annual Observer Program, General Counsel, and Enforcement costs would be approximately $0.3 million higher. However, some of this additional cost would be justified to improve compliance even if none of the changes of Option 1 were made.

3.5 Option 2 for Alternatives 2 and 3: Grant NMFS the Authority to Place NMFS Staff and Other Qualified Persons Aboard Vessels and at Plants

Option 2 was developed by NMFS to allow a more effective use of NMFS staff and other qualified persons

with respect to meeting the mission of the Observer Program. More specifically, Option 2 would: (1) increase the ability of NMFS to work with industry, observers, and observer providers to resolve the many issues that face the stakeholders in the North Pacific; (2) increase its ability to prepare for future data needs and develop sampling regimes and special projects that satisfy the needs of NMFS many clients; and (3) foster a more cooperative working relationship with better informed participants. It would do this by granting to NMFS the authority to place NMFS staff and other qualified persons aboard groundfish and halibut vessels and at groundfish plants. The key elements of Option 2 were identified in Section 2.5. This section, Section 3.5, contains a discussion of the need for and expected effects of Option 2 and the sub-options within. A more detailed discussion of the economic effects is contained in sections 5 and 6.

Sub-options to determine which vessels will be affected.

1. Exempt vessels less than 60' LOA from NMFS deployments.

2. Exempt vessels that target halibut, unless currently required to carry an observer, from NMFS deployments.

Sub-option to limit the number of days NMFS can deploy staff and qualified persons.

1. Set an initial cap of 750 days per year, but allow that cap to be modified through a regulatory amendment.

3.5.1 Need for Action

Groundfish observers operate in challenging, variable, and dynamic environments. NMFS believes that, by deploying qualified persons on fishing vessels and at processing plants, it can improve the ability of observers to operate successfully in these environments and, thereby, assist the Observer Program in performing its critical scientific, conservation, and management functions more effectively. Such deployments would enable NMFS to maintain a working knowledge of observer duties and help them address concerns raised by industry, observer providers, and observers in the field. In addition, they would provide a wealth of information that could be used to better train, support, and debrief groundfish observers.

The BSAI and GOA Fishery Management Plans both contain the following directive: "To address management and scientific information needs, NMFS, in consultation with the Council, will require U.S. fishing vessels that catch groundfish from the EEZ or receive groundfish from the EEZ, and shoreside processors that receive groundfish caught in the EEZ, to accommodate observers certified by NMFS. Provisions of the groundfish observer program will be developed in consultation with the Council and established in regulations..." The cumulative effect of these provisions provide NMFS the authority to deploy staff and other qualified persons as observers, but this authority has not been specifically implemented through regulations in the North Pacific.

Observers are defined 50 CFR §679.2 as, “any individual that is awarded NMFS certification to serve as an observer under this part, is employed by an observer contractor for the purpose of providing observer services to vessels or shoreside processors under this part...”. Additionally, vessels and shoreside processors must procure observers through certified observer providers (50 CFR 679.50(g)). NMFS proposes to expand the regulatory definition of an observer to include NMFS staff and other qualified persons deployed for purposes of management and conservation, but who need not be employed by a NMFS-certified observer provider.

Additionally, a provision will be included that specifies that NMFS staff and other qualified persons will not be procured through certified observer providers, they will be deployed by NMFS. This expanded definition will allow vessels and plants to receive credit toward their observer coverage requirements where appropriate, but will not require that credit be awarded. Whether or not coverage credit is granted will depend on the functions performed by the NMFS staff or other qualified person.

These new provisions will allow NMFS staff or other qualified persons to expand the functions that can be performed during a deployment, increase the ability of NMFS to deploy people in a timely manner, and improve NMFS' ability to place people where they feel they are needed most. This will increase the effectiveness of the resources that NMFS can provide to the industry.

The purposes for NMFS deploying qualified persons would include the following:

1. *Satisfy requests for assistance from vessels or plants;* Presently, NMFS has limited ability to deploy qualified persons to perform observer duties when requested by industry. NMFS has qualified persons available, yet their time on vessels and at processing plants cannot be used to satisfy observer coverage requirements. NMFS believes this makes industry less likely to take or request individuals to resolve sampling issues.

   NMFS deployments appear to be necessary for resolving vessel and/or fishery specific sampling issues that observers encounter at sea. Presently, NMFS attempts to resolve these issues dockside, but has been met with limited success in certain circumstances. If NMFS were given the authority to deploy qualified persons, the agency would be in a better position to resolve observer related issues by placing the appropriate individual where they are needed. Allowing vessels and shoreside processors to use this time to satisfy observer coverage requirements would also encourage industry to request assistance when faced with observer sampling issues or questions about observer duties.

2. *Solve perceived sampling issues;* At times NMFS becomes aware of potential sampling issues in a particular fishery, with a specific observer, or at a vessel or plant. NMFS, however, does not have the authority to deploy qualified persons to address these issues where they are occurring and must attempt to resolve the issue dockside or after the incident has occurred. After-the-fact resolution is often difficult if industry and observer accounts differ.

   In order to successfully resolve perceived sampling issues, it is imperative that NMFS deploy people to work alongside industry, and in some cases observers. This involves deploying qualified persons to vessels and shoreside processors. If NMFS had the ability to deploy qualified persons, they could witness or conduct sampling first hand and potentially alleviate sampling issues that otherwise go unresolved or crop up again as soon as the vessel or plant gets a new observer. Working cooperatively with industry should also afford NMFS a forum to discuss observer duties and the data they collect. In some instances, merely having qualified persons on vessels and at plants may encourage industry to modify their procedures or add space or equipment that would accommodate effective observer sampling.

3. *Create new sampling schemes through proactive measures;* Observer data is the cornerstone used to effectively manage North Pacific groundfish fisheries. In these dynamic fisheries, NMFS' ability to adjust and modify observer sampling procedures is a critical component in

meeting agency stewardship responsibilities. Deploying qualified persons so that they may spend time at sea or shoreside plants, acting in the capacity of observers or performing special projects, will dramatically increase NMFS' ability to identify or create necessary modifications to observer sampling protocols.

As the nation's fisheries continue to change and management schemes are modified, it is likely that observer sampling protocols will be adjusted. Using qualified persons to field test new data collection protocols will not only keep NMFS current, it will allow NMFS to gain a thorough understanding of the limitations and strengths of observer data. Furthermore, deployments will give NMFS the opportunity to work alongside industry and observers when developing new sampling protocols. This cooperative approach should allow NMFS to receive valuable input from industry and observers.

4. *Work cooperatively with vessels and plants on observer issues (e.g., address potential compliance concerns);* Allowing NMFS to deploy qualified persons as observers provides a unique and valuable opportunity for industry and NMFS to interact in a cooperative fashion. The deployment of qualified persons on vessels would enable NMFS to address industry concerns in real time, with tangible results. By experiencing these issues for themselves and having the opportunity to resolve the issue with industry NMFS expects the number of compliance concerns to decrease and the amount of industry cooperation to increase.

5. *Create vessel and plant specific sampling profiles that include industry input;* Currently, NMFS creates sampling profiles based on observer reports of how to best accomplish data collection. This process does not include staff visits to vessels or plants, nor does it include input from industry. The result is incomplete sampling profiles for many vessels and profiles that contain information that may be outdated or inaccurate. Deployments to complete vessel and plant sampling profiles, with input from observers and industry, would greatly enhance the usefulness and accuracy of profiles. Receiving industry's support at this level should also foster a more cooperative working environment for observers.

6. *Keep NMFS staff current with the realities of working at sea;* NMFS employs many staff that are former observers. All training, debriefing, and field staff were observers at one time, but some have not been to sea since they were hired by NMFS. Having the ability to deploy NMFS staff, both as observers and in other capacities, would keep staff current with the rigors of working at sea, allow for extended periods of industry outreach, enable staff to collect observer or special project data, and give staff more credibility in the eyes of those they train and debrief. By keeping current with the realities of working at sea, staff will be better prepared to debrief returning observers, make recommendations about observer sampling and special projects, and assist industry when they have questions regarding observer duties, all of which serve to enhance the effectiveness, efficiency, and capabilities of the Observer Program.

7. *Assist in developing and implementing special projects;* Each year observers complete 10 - 13 special projects to satisfy client data needs. Not all observers are assigned special projects and each project requires individual training and sampling protocols outside of those an observer would normally employ. Having the ability to deploy qualified persons to complete special projects or to develop protocols for future special projects would greatly enhance the ability of NMFS to collect this highly valued data. Placing qualified persons on vessels would enable

NMFS to target fisheries where there are no observers, especially on vessels requiring only 30% coverage, vessels less than 60' LOA, and on vessels of any length that target halibut. In addition, NMFS would have the ability to discuss the specifics of special projects with industry and receive their input in the course of conducting work at sea or in processing facilities. Relying solely on voluntary participation by industry, however, introduces potential that NMFS may not be able to accomplish its goals if vessels and plants do not want to participate. This creates the need for NMFS to have the authority to assign staff to vessels and plants.

8. *Place staff and other qualified persons in fisheries with minimal or no observer coverage requirements (e.g., vessels less than 60' and halibut vessels);* Vessels under 60' LOA and vessels of any length that target halibut have long benefitted from observer data without taking on any of the financial responsibility for the collection of this data. This situation places a disproportionate burden on the rest of the fleet and has created a gap in the data used to manage North Pacific fisheries. Occasionally placing staff and qualified persons on these vessels may provide NMFS the opportunity to identify whether or not there is a reasonable need to require observer coverage and also allow NMFS to collect a limited amount of data from these sectors of the fleet.

3.5.2 Deployments satisfying observer coverage requirements

NMFS would like to work cooperatively with industry to deploy qualified persons to vessels and plants. Industry requests based on a desire to improve the quality of data collected by observers would be honored if NMFS had the resources available. NMFS recognizes that not all vessels or plants will request assistance, particularly those that are not currently required to carry an observer; this creates the need for NMFS to have the authority to assign people to any specific vessel or plant. A combination of these deployment types, requested and assigned, will enable NMFS to accomplish the eight purposes listed above.

In addition to industry-requested deployments, NMFS needs the authority to assign qualified persons to vessels and plants based on observer reports of sampling difficulties. In many cases NMFS has found they cannot adequately address observer sampling issues through dockside meetings or brief meetings at plants. NMFS believes they need the ability to sample as observers in order to develop workable solutions to the multitude of sampling issues observers encounter. Actually working on vessels and at plants will allow NMFS to experience observer sampling difficulties first hand and also allow NMFS to discuss these issues with industry and propose potential solutions. NMFS intends to provide industry with at least two weeks notice prior to assigning staff or a qualified person to vessels and plants required to carry observers.

In addition to solo deployments, NMFS intends to deploy staff or qualified persons to work along side observers by replacing one observer in situations where two are required by regulation (e.g., CDQ and American Fisheries Act (AFA)). In most instances, NMFS believes it would deploy staff to work with new observers on AFA and CDQ pollock vessels. NMFS, however, needs the authority and flexibility to deploy staff or qualified persons with experienced observers in certain situations.

NMFS believes that approximately 70% of the annual deployments will be accounted for deployments in which NMFS staff or other qualified persons would complete the normal duties of an observer on vessels or at plants that have observer coverage requirements. These deployments would count towards satisfying observer coverage requirements.

3.5.3 Deployments that would not satisfy observer coverage requirements

Remaining deployments (approximately 30% of the total annual deployments) would be used to accomplish a variety of other tasks. NMFS needs the authority to place qualified persons on vessels and at plants outside of, or in addition to, when an observer is required by regulation. This includes deployments to vessels less than 60' LOA, vessels of any length targeting halibut, vessels and plants already carrying an observer, and other vessels and plants that participate in groundfish fisheries.

Vessels less than 60' LOA and halibut vessels would be chosen based on research needs within specific fisheries and areas. It is likely that vessels would be chosen using a cooperative approach whereby NMFS would work with industry to identify vessels suited for the research at hand. NMFS would retain the authority to assign a staff member if the cooperative approach did not produce a viable candidate vessel. NMFS anticipates that it can provide vessel owners with one month advanced notice if their vessel is selected for a deployment. Following notification, industry would be required to let NMFS know when and where they would pick up the individual. NMFS would incur the costs associated with transporting staff to vessels and plants as well as housing costs before and after deployments.

NMFS will not impose requirements for a sampling station, USCG safety decal, or berthing for vessels less than 60' LOA. Vessels in this category would be encouraged to obtain a USCG safety inspection, but would not be required to do so. In cooperation with the USCG, NMFS will work with staff and qualified persons to ensure they have enough training and experience to determine if vessels have the proper safety equipment for their deployment. If NMFS or the person to be deployed on a vessel does not believe the vessel meets minimum requirements (e.g., not enough life raft capacity to accommodate additional person, inadequate accommodations, inadequate workstation, etc.), the deployment will not occur. In these situations, NMFS would either work with industry to identify another vessel that may be more suitable or would choose another vessel. Deployments to vessels less than 60' LOA are expected to last approximately 1 - 3 trips (8 - 10 days total) for each vessel chosen for deployment.

If deployed in addition to observers, NMFS envisions having staff and qualified persons work in several capacities including, (1) completing a special project outside the scope of observer duties, (2) observing how the observer(s) are conducting their duties in order to make recommendations for changes to observer sampling protocols, (3) working alongside observers in a particular fishery, or (4) attempting to improve interactions and communication between observers and industry. These deployments would provide NMFS with an opportunity to mentor observers, conduct outreach activities, and collect scientific data.

If deployed outside of when an observer is required, NMFS staff and qualified persons may collect data from a particular fishery or class of vessel, conduct a special project, or work with a vessel or plant to improve sampling conditions for observers. These deployments should be extremely valuable for industry to receive input on a variety of topics. Although deployed individuals may not be able to answer every question, they will be able to track down information following their deployment and respond to industry.

3.5.4 Potential Effects

In addition to improving the effectiveness of the Observer Program, this regulatory action would affect the fishing industry, observers, and observer providers. It is difficult for NMFS to quantify future research needs and potential increases in Observer Program staffing and funding. NMFS also cannot project the future needs that may be generated by Council action, industry, or other agencies. For this reason, NMFS is proposing no

limit to the number of days that staff and qualified persons can be deployed each year.

While the Observer Program estimates that it can provide 500 annual deployment days with its present staff, limiting the number of deployment days may inhibit NMFS' ability to interact effectively with the fleet and provide adequate support for observers and research activities. Having no annual cap would allow flexibility when fulfilling requests for staff, dealing with sampling issues, and conducting research without the fear of running out of days and potentially limiting the services that this program will provide. The Observer Program intends to provide an annual update as to the previous year's activities and will seek input for the following year's deployments. This process will allow for input from the Council, industry, observers, and observer providers while maintaining maximum flexibility.

NMFS is also presenting a sub-option that would cap NMFS deployment days at 750 days per year but that cap could be modified through a regulatory amendment. This process would allow for input from the Council, industry, observers, observer providers. However, if selected, this sub-option could potentially inhibit NMFS' ability to handle research needs or provide observer support if situations arise that would warrant deployments beyond those allocated at the beginning of the year. This process would also place additional burdens on the Observer Program as they would be required to justify the following year's deployments without knowing what issues will develop that need to be addressed.

Fishing Industry: This action would impose both direct and indirect costs on the fishing vessels and processing plants. Vessels would incur the costs of housing and feeding the deployed individuals while at sea. Vessels and plants could incur costs due to operational changes that occur as a result of these deployments. This would include the opportunity cost of a bunk space, that is the cost of decreasing crew size by one to make room for the deployed individual. There would also be some additional costs associated with switching observers for staff members. This could include additional transportation costs and delay costs if the NMFS staff or qualified person is not there when a vessel is ready to leave port. To the extent possible, NMFS would endeavor to ensure that staff arrive at the designated place and time as agreed upon or earlier when there are weather or transportation concerns.

According to current projections of 500 days per year, NMFS expects that about 70% of its deployments would replace an observer supplied by an observer provider. In part, the actual percentage will depend on additional services that may be requested by the Council, NMFS researchers, or industry in any given year. For deployments where NMFS staff or other qualified persons replace observers, the costs to the fishing industry are expected to be substantially less than the reduction in its payments to observer providers (i.e., there will be a net reduction in costs incurred by industry). In addition to monetary benefits to industry, this option is expected to provide for: (1) a more effective, informed, proactive, and less contentious method for addressing sampling problems; (2) improved quality of observers; (3) improved quality of Observer Program; and (4) assistance in meeting the need for an Observer Program that is more compatible with a vessel-by-vessel accounting system. A regulatory framework that does not limit the number of deployment days has the greatest potential to provide benefits in the aforementioned areas and would provide the most benefit to industry.

The amount of savings or additional costs would largely depend on the length of a deployment and the annual number of days that staff are deployed in lieu of observers. For the vessels and plants to which qualified persons would be deployed, NMFS believes it can accomplish its goals with deployment lengths of three trips (approximately two weeks) for catcher vessels, one trip (approximately three weeks) for catcher/processors and motherships, and three weeks for plants. If the goals of the deployment were accomplished earlier, NMFS

anticipates it would pull the individual at the vessel's or plant's earliest convenience.

By hosting a deployment, vessels and plants should gain a better understanding of what NMFS expects and how to interact with groundfish observers. With a better understanding of NMFS' expectations and more field presence of NMFS staff, compliance concerns should decrease. The end result would be fewer complaints to NMFS and observer providers and less staff time spent dealing with these issues.

If, as assumed earlier, NMFS is capable of deploying staff for 500 days per year and there would only be about 150 deployment days per year that are not substitutes for required observer coverage days, the fishing industry would incur the cost of feeding an additional person onboard for those 150 days. Based on industry estimates of the cost per day to feed crew, that cost would be less than $4,000. The opportunity cost of providing bunk space will vary by deployment. At current rates for contracted observers, if 350 observer deployment days provided by observer providers and their observers were replaced with observer days provided by NMFS, the fishing industry would save approximately $115,000 a year (approximate cost for observers, airfare, and meals).

Observers and Observer Providers At current staff levels, NMFS envisions it can accomplish 500 deployment days per year, of which about 350 days would replace observer coverage days that would otherwise be provided by observer providers and their observers. This is slightly less than 1% of the current annual observer coverage days. The remaining 150 days would not directly impact observers or observer provider coverage days.

In order to fully accomplish its goals, NMFS needs the flexibility to deploy qualified persons to work with observers or to work where there are no observers assigned. NMFS is confident that working both independently and in conjunction with observers will allow NMFS to create a better working environment for all observers and provide increased oversight by NMFS. Those improvements could more than offset the small decreases in observer employment opportunities that would occur if NMFS deployments displaced deployments by observer providers.

NMFS would make every effort to plan deployments well in advance. Doing so would allow observer providers to adjust their hiring plans accordingly. This should ensure that NMFS deployments have a minimal impact on observer logistics, which should help control costs. NMFS deployments that displace observers will have a direct financial effect on providers and observers, but NMFS believes each will benefit from improved observer retainment, improved communication with NMFS, and a less adversarial working environment. These benefits will result from both the increased interactions of NMFS staff with observers and the clients of the observer providers and the increased ability of NMFS to prevent or resolve problems faced by observers.

If the number of observer deployment days provided by observer providers and their observers decreased by 350 days, there would be a decrease in observer provider revenue of about $100,000 (total observer provider compensation prior to observer payment) and a decrease in observer income of about $50,000. Industry is responsible for board and reimburses observer providers for airfare, which accounts for the $15,000 difference between industry payments and observer provider revenue.

The sub-option that would establish an initial cap of 750 days would have the following affects: If NMFS deployed staff or qualified persons for 750 days and 70% of those days (525 days) displaced observers, then observer provider revenue would decrease about $150,000 and observer income would decrease about

$75,000. Under the sub-option this amount could go up or down each year, however, NMFS cannot presently provide 750 days of deployments and may not be able to do so for several years.

NMFS: With this regulatory action, NMFS will be in a better position to work with industry, observers, and observer providers to resolve the many issues that face the stakeholders in the North Pacific. NMFS will also be in a better position to prepare for future data needs and develop sampling regimes and special projects that satisfy the needs of NMFS many clients. This type of program would also give industry and observers more exposure to NMFS staff, which will foster a more cooperative working relationship with better informed participants.

The cost to NMFS of deploying staff and other qualified persons for 500 days would be approximately $75,000 for transportation, per diem, and overtime. The cost of salaries and benefits (about $200,000/year) is not included because in the absence of these deployments, these individuals would be assigned to other tasks. At present NMFS has the resources for 500 deployment days per year, but restricting NMFS deployments to 500 days may limit future benefits to industry, observers, and NMFS. NMFS believes that these deployments would be a very effective use of staff resources.

If not restricted by a cap, NMFS will have the greatest flexibility to provide benefits to observers, observer providers, and industry. NMFS will also be more capable of accommodating research needs without the fear of impacting the number of days staff can be sent to sea to work as observers. In contrast, creating an upper limit to the number of days NMFS staff can be deployed may limit the flexibility of the Observer Program to take on work outside the scope of observer duties. This will also create the need for the Observer Program to justify a set number of days for the following year's deployments prior to knowing observer needs, industry requests for assistance, or research needs that may arise during the following year.

3.5.5 Summary

In a study of the West Coast groundfish fishery, Harms and Sylvia (2001), determined that participants and managers both felt that scientists accompanying fishermen on fishing trips would be one of the most effective ways to improve working relations between the two groups. This regulatory action would give NMFS the authority to deploy qualified persons to vessels and plants participating in North Pacific groundfish and halibut fisheries. NMFS believes this action will improve the working relationship with industry, improve sampling conditions and support for observers in the field, and allow for the collection of higher quality scientific data to be used for the management of our fisheries. This action will also give NMFS more presence in the field and allow for more interaction and collaboration with industry and observers.

Based on the assumed size and scope of this program (500 days per year), and the associated cost estimates presented, this action would result in the observed sector of industry realizing a cost savings of approximately $115,000 per year while the unobserved sector of industry may potentially expend an additional $4,000 per year. Observers could incur lost wages of approximately $50,000 while observer provider revenues would be reduced approximately $100,000 per year. NMFS would incur approximately $75,000 in additional costs because of logistics and transportation costs that would result from this action.

3.6 Summary with Respect to NMFS Providing Additional Support for the Observers

NMFS is proposing these actions in large part to provide additional support to observers and bolster the overall observer system (observers, observer providers, NMFS, and industry). Observers and observer

providers will be supported by having increased protections from agency actions on certifications and permits through better appeal processes which are APA compliant. Both should also benefit from an additional emphasis on health and safety and increased clarity on several regulations. A number of actions will be of direct benefit to the observers. For example, requiring that observers are fit for duty at the time of embarkation would ensure that observers are not pressured into working while ill and would allow them to recover more quickly from their illnesses. Requiring that observer providers verify that the vessel has a valid USCG safety decal before placing an observer on board, provides a redundant safety check and added security for the observer. The observer provider will also be required to report observer illness and injury problems to NMFS within 24 hours. This would allow the Observer Program to take timely and appropriate action on behalf of the observer if it is so warranted. Requiring in person mid-deployment data reviews will ensure that observers have time and direct access to NMFS staff to resolve problems they are encountering in their work. Ensuring that observer providers have signed and valid contracts with their clients will discourage last minute arrangements for observer services and should result in scheduling benefits for the observers. Observers should also benefit from the added support of NMFS regulations to help ensure that observer providers abide by the terms of their working agreement. If observers have a dispute with their employer over the terms of their agreement, they can turn to NMFS for help, as well as the Union. The improvement to the reporting requirement for insurance, will help NMFS ensure that observers are consistently covered by insurance. Requiring observer providers to assign observers without regard to any preference by representatives of vessels and shoreside facilities will help ensure that observers will not be removed from vessels when the captain does not like them unless there is good reason (i.e., observer is not doing the job correctly). This will help to build better communications between NMFS and the fishing industry which will improve the working relationships among NMFS, observers, observer providers and the fishing industry.

Additional standards for observer providers should improve consistency for observers and industry. A new regulation requiring that observer providers meet the requirements of an observer candidate interview as specified by the Observer Program would especially benefit the new observer candidates. Observer candidates would receive the benefit of consistent, minimum job descriptions and interviews, aiding them in deciding if they are honestly prepared for the job. Other actions such as requiring the observer provider to adhere to employee drug and alcohol policies specified by the Observer Program would ensure that a consistent drug and alcohol policy is applied to all observers. The overall system should benefit with a longer time horizon for the program and the improved communications that will come with the ability to involve NMFS staff in at-sea deployments and direct interactions with and assistance to observers in the field.

4.0 Environmental Assessment

The groundfish fisheries occur in the North Pacific Ocean and Bering Sea in the U.S. EEZ from 50˚ N to 65˚N. These regulations affect groundfish fishing throughout the BSAI and GOA in all statistical areas. Descriptions of the affected environment are given in the Alaska Groundfish Fisheries draft programmatic SEIS (NMFS 2001). Substrate is described at section 3.1.1, water column at 3.1.3, temperature and nutrient regimes at 3.1.4, currents at 3.1.5, groundfish and their management at 3.3, marine mammals at 3.4, seabirds at 3.5, benthic infauna and epifauna at 3.6, prohibited species at 3.7, and the socioeconomic environment at 3.10. Additionally, the status of each target species category, biomass estimates, and acceptable biological catch specifications are presented both in summary and in detail in the annual GOA and BSAI stock assessment and fishery evaluation (SAFE) reports. The projections for fishing year 2001 are contained in the 2000 SAFE reports (NPFMC 2001)

An environmental assessment (EA) as described by the National Environmental Policy Act (NEPA) of 1969 is used to determine whether the action considered will result in significant impact on the human environment. If the action is determined not to be significant based on an analysis of relevant considerations, the EA and resulting finding of no significant impact (FONSI) will be the final environmental documents required by NEPA. If the analysis concludes that the proposal is a major Federal action significantly affecting the human environment, an environmental impact statement (EIS) must be prepared.

The environmental impacts generally associated with fishery management actions are effects resulting from 1) harvest of fish stocks which may result in changes in food availability to predators and scavengers, changes in the population structure of target fish stocks, and changes in the marine ecosystem community structure; 2) changes in the physical and biological structure of the marine environment as a result of fishing practices, e.g., effects of gear use and fish processing discards; and 3) entanglement/ entrapment of non-target organisms in active or inactive fishing gear.

As noted above, analyses of the effects of groundfish fishing on the ecosystem, social, and economic environment are contained in the draft programmatic SEIS and are incorporated into this analysis by reference. This analysis includes only those effects that are additional and attributable to promulgation of rulemaking to extend the implementing regulations of the Observer Program, with some modification, past the current expiration date of December 31, 2002. Analysis of impacts are based largely on analyses prepared for each stock, species or species group in the Bering Sea and Aleutian Islands contained in the EA for the 2002 Total Allowable Catch (TAC) specifications, which is also incorporated by reference herein. The TAC setting process is the basis for defining upper retained harvest limits, or fishery removals, for the subject fishing year. Catch specifications are made for each managed species or species group, and in some cases, by species and sub-area. Sub-allocations of TAC are made for biological and socio-economic reasons according to percentage formulas established through fishery management plan (FMP) amendments. For particular target fisheries, TAC specifications are further allocated within management areas (Eastern, Central, Western Aleutian Islands; Bering Sea; Western, Central, and Eastern Gulf of Alaska) among management programs (open access or community development quota program), processing components (inshore or offshore), specific gear types (trawl, non-trawl, hook-and-line, pot, jig), and seasons. TAC can be sub-allocated to the various gear groups, management areas, and seasons according to pre-determined regulatory actions and for regulatory announcements by NMFS management authorities opening and closing the fisheries accordingly. The entire TAC amount is available to the domestic fishery. The gear authorized in the Federally managed groundfish fisheries off Alaska includes trawl, hook-and-line, longline pot, pot, and jig (50 CFR 679.2).

The fishing year coincides with the calendar year, January 1 to December 31. Depending on the target species' spatial allocation, additional specifications are made to particular seasons (defined portions of the year or combinations of defined portions of the year) within the fishing year. Any TACs not harvested during the year specified are not rolled over from that fishing year to the next. Fisheries are opened and closed by regulatory announcement. Closures are made when inseason information indicates the apportioned TAC or available prohibited species catch (PSC) limit has been or will soon be reached, or at the end of the specified season, if the particular TAC has not been taken.

TAC specifications for the federal groundfish fisheries are set annually. The process includes review of the SAFE reports by the North Pacific Fishery Management Council (Council) and by the Council's Advisory Panel and Scientific and Statistical Committee. Using the information from the SAFE Reports and the advice from Council committees, the Council makes both ABC and TAC recommendations toward the next year's TAC specifications. NMFS packages the recommendations into specification documents and forwards them to the Secretary of Commerce for approval.

The goal of implementing an observer program is to provide information essential for the management of sustainable fisheries, associated protected resources, and marine habitat in the North Pacific. This goal is supported by objectives that include (1) provision of accurate and precise catch, bycatch and biological information for conservation and management of groundfish resources and the protection of marine mammals, seabirds, and protected species; (2) provision of information to monitor and promote compliance with NOAA regulations and other applicable programs; and (3) support NMFS and the Council policy development and decision making. The Observer Program provides information to monitor the effectiveness of, and compliance with, fisheries management decisions made through the annual TAC setting process and the effects they have on the human and natural environment. An implicit assumption made in this analysis is that the annual specifications that are implemented each year, and which set the parameters under which all the North Pacific groundfish fisheries will operate (who, what , where, and when), were selected based on a thorough evaluation of potential effects on the species, species groups or other marine environmental issues for the fishing year being considered. Therefore, the effects of the alternatives in this action, which will determine the parameters under which those fisheries will be monitored, are evaluated based on the assumption that the effects of the fisheries themselves on the marine resources being considered here are expected to be within acceptable levels. This analysis therefore only considers whether the alternatives (essentially limited to monitoring or not monitoring at the current levels) will effect resources in any way that is different from the effects expected under the preferred alternative chosen for the annual TAC specifications.

This section forms the analytic basis for issue comparisons across alternatives. As a starting point, each alternative under consideration is perceived as having the potential to significantly affect one or more components of the human environment. Significance is determined by considering the context in which the action will occur and the intensity of the action. The context in which the action will occur includes the specific resources, ecosystem and human environment affected. The intensity of the action includes the type of impact (beneficial versus adverse), duration of impact (short versus long term), magnitude of impact (minor versus major), and degree of risk (high versus low level of probability of an impact occurring). Further tests of intensity include: (1) the potential for compromising the sustainability of any target or non-target species; (2) substantial damage to marine habitats and/or essential fish habitat; (3) impacts on public health and safety; (4) impacts on endangered or threatened species or critical habitat of listed species; (5)cumulative adverse impacts; (6) impacts on biodiversity and ecosystem function; (7) significant or economic impacts; and (8) degree of controversy (NAO 216-6, section 6.02).

Differences between direct and indirect effects are primarily linked to the time and place of the impact. Direct effects are caused by the action and occur at the same time and place as the impact of the action. Indirect effects occur later in time and/or further removed in distance form the direct effects (40CFR 1508.27). For example, the direct effects of an alternative that lowers the harvest level of a target fish could include a beneficial impact on the targeted stock of fish, neutral impact on the ecosystem, and an adverse impact on net revenues to fishermen. The indirect effects of that action could include beneficial impacts on the ability of Steller sea lions to forage for prey, neutral impacts on incidental levels of prohibited species catch, and adverse impacts in the form of multiplier effects reducing employment and tax revenues to coastal fishing communities.

Each section below includes an explanation of the criteria used to establish significance and a determination of significance, insignificance or unknown for each resource, species or issue being treated. The criteria for significance are summarized in a table for each section. These criteria are the same as those used to evaluate the effects on resources of alternatives proposed for the TAC setting process. The following ratings for significance are used: significant (beneficial or adverse), insignificant, or unknown. In general, the discussions and rating criteria are qualitative in nature. In instances where criteria to determine significance does not logically exist, none are noted. These situations are termed "not applicable" (or NA) in the criteria tables. The significance determinations are summarized in each section.

The rating terminology used to determine significance are the same for each resource, species, or issue treated, although the reference points for each may differ. The generic definitions for the assigned ratings are as follows:

S+ Significant beneficial effect in relation to the reference point; this determination is based on interpretations of available data and the judgement of the analysts who addressed the topic.

I Insignificant effect in relation to the reference point; this determination is based on interpretations of available data and the judgement of the analysts, which suggests the are small and within the "normal" variability surrounding the reference point.

S- Significant adverse effect in relation to the reference point; this determination is based on interpretations of available data and the judgement of the analysts who addressed the topic.

U Unknown effect in relation to the reference point; this determination is made in the absence of information or data suitable for interpretation with respect to the question of impacts on the resource, species, or issue.

4.1 Trophic Interactions

4.1.1. Effects on Fish species

The general impacts of fishing mortality within FMP Amendment 56/56 ABC/OFL definitions are discussed in Section 2.7.4 of the Draft Programmatic SEIS, and apply to all fish species for which a TAC is specified. Beginning in 2002, a modified harvest control rule will apply to the directed fisheries for pollock, Pacific cod, and Atka mackerel that will result in no directed fisheries when the spawning biomass is estimated to be less than 20% of the projected unfished biomass. This new harvest control rule was evaluated in the Steller Sea Lion Protection Measures SEIS (NMFS 2001).

Assessing the effects of each alternative on target commercial fish species was accomplished by

asking the following questions of each of the five alternatives for each target species or species group for which a TAC amount is being specified:

1. How much effect does the alternative have on fishing mortality?
2. How much effect does the alternative have on spatial or temporal concentration of the species?
3. How much effect does the alternative have on the availability of prey for the target species?
4. How much effect does the alternative have on the target species' habitat?

Table 4-1a. Criteria used to estimate significance of effect on targeted groundfish stocks in the Bering Sea, Aleutian Islands, and Gulf of Alaska by Alternatives 1 - 3.

Direct Effects	**Significant Adverse**	**Significant Beneficial**	**Insignificant**	**Unknown**
Fishing Mortality	reasonably expected to jeopardize the capacity of the stock to produce MSY on a continuing basis	N/A	reasonably not expected to jeopardize the capacity of the stock to produce MSY on a continuing basis	unknown fishing mortality rate
Changes in genetic structure of population	evidence of genetic subpopulation structure; evidence that monitoring distribution of harvest leads to detectable decrease in genetic diversity such that it jeopardizes ability of stock to sustain itself at or above MSST.	evidence of genetic subpopulation structure; evidence that monitoring distribution of harvest leads to detectable increase in genetic diversity such that it enhances ability of stock to sustain itself at or above MSST.	evidence that monitoring distribution of harvest is not sufficient to alter the genetic subpopulation structure such that it jeopardizes ability of the stock to sustain itself at or above the MSST.	MSST and genetic structure is unknown. Therefore no information to evaluate if monitoring distribution of catch changes genetic structure of the population such that it jeopardizes or enhances ability of stock to sustain itself at or above MSST.

Changes in reproductive success	evidence that monitoring distribution of harvest leads to detectable decrease in reproductive success such that it jeopardizes the ability of the stock to sustain itself at or above MSST.	evidence that monitoring distribution of harvest leads to detectable increase in reproductive success such that it enhances the ability of the stock to sustain itself at or above MSST.	evidence that monitoring the distribution of harvest will not change reproductive success such that it jeopardizes the ability of the stock to sustain itself at or above MSST.	MSST is unknown. Therefore no information regarding the potential impact of the distribution of the catch on reproductive success such that it jeopardizes or enhances ability of the stock to sustain itself at or above MSST.
Indirect Effects				
Change in prey availability	evidence that monitoring current harvest levels and distribution of harvest levels lead to a change in prey availability such that it jeopardizes the ability of the stock to sustain itself at or above MSST.	evidence that current harvest levels and distribution of harvest lead to a change in prey availability such that it enhances the ability of the stock to sustain itself at or above MSST.	evidence that current harvest levels and distribution of harvest do not lead to a change in prey availability such that it jeopardizes the ability of the stock to sustain itself at or above MSST.	MSST is unknown. Therefore no information regarding the potential impact of current harvest levels and distribution of the catch lead to a change in prey availability such that it enhances or jeopardizes ability of the stock to sustain itself at or above MSST.
Change in suitability of spawning, nursery, or settlement habitat	evidence that monitoring levels of habitat disturbance are sufficient to lead to a decrease in spawning or rearing success such that it jeopardizes the ability of the stock to sustain itself at or above MSST.	evidence that monitoring levels of habitat disturbance are sufficient to lead to an increase in spawning or rearing success such that it enhances the ability of the stock to sustain itself at or above MSST.	evidence that monitoring levels of habitat disturbance are not sufficient to lead to a detectable change in spawning or rearing success such that it jeopardizes the ability of the stock to sustain itself at or above MSST.	MSST is unknown. Therefore no information that current levels of habitat disturbance are sufficient to lead to a detectable change in spawning or rearing success such that it jeopardizes or enhances ability of the stock to sustain itself at or above MSST.

Table 4-1b: Summary of Impacts of Alternatives 1-3 on targeted groundfish stocks.

Summary of Impacts:	Alternative 1	Alternative 2	Alternative 3
Direct Effects			
Fishing Mortality	S-	I	I
Changes in genetic structure of population	S-	I	I
Changes in reproductive success	S-	I	I
Indirect Effects			
Change in prey availability	S-	I	I
Change in suitability of spawning, nursery, or settlement habitat	S-	I	I

Discussion: Analyses of impacts are based largely on analyses prepared for each stock, species or species group in the Bering Sea and Aleutian Islands contained in the EA for the 2002 TAC setting process. These ratings use a minimum stock size threshold (MSST) as a basis for positive or negative impacts of each alternative. A thorough description of the rationale for the MSST can be found in National Guidelines 50 CFR 600 (Federal Register Vol. 63, No. 84, 24212 - 24237). The TACs, as specified, are based on spawning stock biomass that are expected to be above the MSST, and the probability that overfishing would occur within the TAC levels is low for all the stocks. The target species stocks are currently above their MSSTs and, based on the TAC levels, overfishing of spawning stock would not be expected. Therefore genetic integrity and reproductive potential of the stocks should be preserved. However, if harvest levels are not monitored and fisheries are not closed based on real time harvest data, it is assumed that overfishing would occur in most, if not all, the target fisheries, due to the existing fishing capacity and a lack of information available to managers to accurately predict when TAC levels are being approached. This would lead to a number of adversely significant effects.

Alternative 1: Impacts to the target species stock, species or species group are predicted to be adversely significant for all target fish evaluated because the following significance criteria are met by the expected result of overfishing: (1) they would be expected to jeopardize the capacity of the stock to produce maximum sustainable yield on a continuing basis; (2) they would alter the genetic sub-population structure such that it jeopardizes the ability of the stock to sustain itself at or above the minimum stock size threshold; (3) they would alter harvest levels such that it jeopardizes the ability of the stock to sustain itself at or above the minimum stock size threshold; (4) they would alter harvest levels or distribution of harvest such that prey availability would jeopardize the ability of the stock to sustain itself at or above the minimum stock size threshold; and (5) they would disturb habitat at a level that would alter spawning or rearing success such that it would jeopardize the ability of the stock to sustain itself at or above the minimum stock size threshold. See the individual species and species groups stock assessments in the SAFE reports for additional information and documentation of this year's assessment process.

In general, harvest information collected by observers, together with information from other sources as outlined in Appendix A, is used by NMFS' in-season management to assess catch levels relative to the TACs. Even with monitoring, fisheries occasionally may be closed after TACs have been reached, resulting in some level of over harvesting relative to TACs. The more observer information available to managers, the more closely the closures will approximate the intended harvest levels set by the TACs.

Alternative 2: Monitoring target fishery harvest under this alternative will provide the same level of information to managers as is currently being collected and provided under the Interim program. Effects of this alternative are considered to be insignificant.

Alternative 3: Monitoring target fishery harvest under this alternative will provide the same level of information to managers as is currently being collected and provided under the Interim program. Effects of this alternative are considered to be insignificant.

4.1.2. Effects on Prohibited Species

Table 4-2a. Criteria used to estimate significance of effect of PSC on prohibited species in the Bering Sea, Aleutian Islands, and Gulf of Alaska by Alternatives 1 - 3.

Intensity of Effect	**Significant Adverse**	**Significant Beneficial**	**Insignificant**	**Unknown**
Fishing Mortality	Reasonably expected to jeopardize the capacity of the stock to maintain reference point population levels*	Not Applicable	Reasonably not expected to jeopardize the capacity of the stock to maintain reference point population levels	Insufficient information available

* population reference points : Pacific salmon - minimum escapement goals; Pacific halibut - estimated long term CEY level; Pacific herring - minimum spawning biomass threshold; crab - minimum stock size threshold.

Table 4-2b Summary of Impacts of Alternatives 1-3 on prohibited species.\

Summary of impacts of incidental catch of prohibited species	**Alternative 1**	**Alternative 2**	**Alternative 3**
Pacific salmon	S-	I	I
Pacific halibut	S-	I	I
Pacific herring	S-	I	I
Crab	S-	I	I

Discussion:
Prohibited species in the groundfish fisheries include: Pacific salmon (chinook, coho, sockeye, chum, and pink), steelhead trout, Pacific halibut, Pacific herring, and Alaska king, Tanner, and snow crab. The most recent review of the status of crab stocks may be found in 2001 Crab SAFE (NPFMC, October 2001) and for the other species in Section 3.5 of the Steller Sea Lion Protection Measures SEIS (NMFS, 2001c). The effects of the groundfish fisheries in the BSAI and GOA on prohibited species are primarily managed by conservation measures developed and recommended by the Council over the entire history of the FMPs for the BSAI and GOA and implemented by federal regulation. These measures can be found at 50 CFR part 679.21 and include prohibited species catch (PSC) limitations on a year round and seasonal basis, year round and seasonal area closures, gear restrictions, and an incentive plan to reduce the incidental catch of prohibited species by individual fishing vessels. These management measures are discussed in Section 3.5 of the SSL SEIS (NMFS, 2001c) and by Witherell and Pautzke (1997).

Pacific salmon are managed by the State of Alaska on a sustained yield principal. Pre-determined escapement

goals for each salmon stock are monitored on an in-season basis to insure long term sustainable yields. When escapement levels are low commercial fishing activities are curtailed. If escapement levels exceed goals, commercial fishing activities are enhanced by longer open seasons. In instances where minimum escapement goals are not met sport and subsistence fishing activities may also be curtailed. The criteria used to determine the significance of effects under each alternative on salmon stocks was whether or not salmon escapement needs would reasonably expected to be met. If the alternative was reasonably not expected to jeopardize the capacity of the salmon stocks to produce long term sustainable yields it was deemed insignificant, if the alternative was reasonably expected to jeopardize the capacity of the salmon stocks to produce long term sustainable yields it was deemed significantly adverse, where insufficient information exists to make such conclusions the alternative's effects are unknown.

The International Pacific Halibut Commission (IPHC) is responsible for the conservation of the Pacific halibut resource. The IPHC uses a policy of harvest management based on a constant exploitation rates. The constant exploitation rate is applied annually to the estimated exploitable biomass to determine a constant exploitation yield (CEY). The CEY is adjusted for removals that occur outside the directed hook-and-line harvest (incidental catch in the groundfish fisheries, wastage in halibut fisheries, sport harvest, and personnel use) to determine the directed hook-and-line quota. Incidental catch of halibut in the groundfish fisheries results in a decline in the standing stock biomass, a lowering of the reproductive potential of the stock, and reduced short and long term yields to the directed hook-and-line fisheries. To compensate the halibut stock for these removals over the short term halibut mortality in the groundfish fisheries is deducted on a pound for pound basis each year from the directed hook-and-line quota. Halibut incidentally taken in the groundfish fisheries are of smaller average size than those taken in the directed fishery, this results in further impacts on the long term reproductive potential of the halibut stock, this impact on average is estimated to reduce the reproductive potential of the halibut stock by 1.7 pounds for each 1 pound of halibut mortality in the groundfish fisheries. These impacts are discussed by Sullivan *et. al.* (1994). The criteria used to determine the significance of effects under each alternative on the halibut stock was whether or not incidental catch of halibut in the groundfish fisheries would reasonably expected to lower the total CEY of the halibut stock below the long term estimated yield of 80 million pounds.

If the alternative was reasonably not expected to decrease the total CEY of the halibut stock below the long term estimated yield of 80 million pounds it was rated insignificant, if the alternative was reasonably expected to lower the total CEY of the halibut stock below the long term estimated yield of 80 million pounds it was rated significantly adverse, where insufficient information exists to make such conclusions the alternative's effects are unknown.

Pacific herring are managed by the State of Alaska on a sustained yield principal. Pacific herring are surveyed each year and the GHLs are based on an exploitation rate of 20% of the projected spawning biomass, these GHLs may be adjusted inseason based on additional survey information to insure long term sustainable yields. The ADF&G have established minimum spawning biomass thresholds for herring stocks which must be met before a commercial fishery may occur. The criteria used to determine the significance of effects under each alternative on herring stocks was whether minimum spawning biomass threshold levels would reasonably expected to be met. If the alternative was reasonably not expected to jeopardize the capacity of the herring stocks to reach minimum spawning biomass threshold levels it was deemed insignificant, if the alternative was reasonably expected to jeopardize the capacity of the herring stocks to reach minimum spawning biomass threshold levels it was deemed significantly adverse, where insufficient information exists to make such conclusions the alternative's effects are unknown.

Alaska king, Tanner, and snow crab stocks in the BSAI are protected by area trawl closures and PSC limitations. Minimum stock size thresholds (MSST) have been established for these crab species stocks to help prevent overfishing. The criteria used to determine the significance of effects under each alternative on crab stocks was whether MSST levels would reasonably expected to occur. If the alternative was reasonably not expected to jeopardize the capacity of the crab stocks to maintain MSST levels it was deemed insignificant, if the alternative was reasonably expected to jeopardize the capacity of the crab stocks to reach maintain MSST levels it was deemed significantly negative, where insufficient information exists to make such conclusions the alternative's effects are unknown.

The establishment by the Council of annual halibut PSC limits in the directed fisheries of the GOA and the annual and seasonal apportionments thereof of all PSC limits to gear types and targets in the BSAI and GOA is of critical importance each year in both minimizing the incidental catch of prohibited species and in maximizing the optimum yield from the groundfish resources to the fishing industry. Under the Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA) National Standard 9 directs that when a regional council prepares an FMP they shall to the extent practicable minimize bycatch and to the extent bycatch cannot be avoided, minimize the mortality of such bycatch. Over the years since the enactment of the MSFCMA in 1976 the Council has recommended and NMFS has implemented over 30 FMP amendments designed to help minimize the incidental catch and mortality of prohibited species. Levels of incidental catch of prohibited species in each fishery in 1999 were used to estimate the effects TAC levels set for each fishery on incidental catch levels of prohibited species under each alternative. It was assumed for each fishery that an increase or decrease in TAC would result in a proportional increase or decrease in incidental catch, increases were not assumed to exceed PSC limitations where applicable.

Alternative 1: Impacts to prohibited species stock, species or species groups are predicted to be adversely significant for those evaluated because the action is reasonably expected to jeopardize the capacity of the stocks to maintain reference point population levels, through expected overfishing in the absence of monitoring. In general, harvest information collected by observers, together with information from other sources as outlined in Appendix A, is used by NMFS' in-season management to assess PSC. Where harvest information is not timely or is inaccurate, fisheries are occasionally closed after PSC levels have been reached, resulting in some level of overharvest, relative to the PSC. The more observer information available to managers, the more closely the closures will approximate the intended PSC levels set by the Council.

Alternative 2: Monitoring target fishery harvest under this alternative will provide the same level of information to managers as is currently being collected and provided under the Interim program. Effects of this alternative are considered to be insignificant.

Alternative 3: Monitoring target fishery harvest under this alternative will provide the same level of information to managers as is currently being collected and provided under the Interim program. Effects of this alternative are considered to be insignificant.

4.1.3. Effects on Marine mammals

Table 4-3a. Criteria used to estimate significance of effect on marine mammals in the Bering Sea, Aleutian Islands, and Gulf of Alaska by Alternatives 1 - 3.

Intensity of effects	Significant Adverse	Significant Beneficial	Insignificant	Unknown
Incidental take/ entanglement in marine debris	take rate increases by > 25%	N/A	level of take below that which would have an effect on population trajectories	insufficient information available on take rates
spatial/temporal concentration of fishery	more temporal and spatial concentration in key areas	much less temporal and spatial concentration of fishery in key areas	spatial concentration of fishery as modified by SSL protection measures	insufficient information as to what constitutes a key area
Disturbance	more disturbance	N/A	similar level of disturbance as that which was occurring in 2001	insufficient information as to what constitutes disturbance

Table 4-3b. Summary of impacts of alternatives 1-3 on marine mammals.

Summary of Impacts:	Alternative 1	Alternative 2	Alternative 3
Incidental take/ entanglement in marine debris	S-	I	I
spatial/temporal concentration of fishery	S-	I	I
Disturbance	U	I	I

Discussion:
Under the Marine Mammal Protection Act, commercial fisheries are each classified according to current and historical data on the level of interaction the fishery has with marine mammals, relative to a threshold level of allowable removal from each species' population. Fisheries that interact with a strategic stock at a level of take which has a potentially significant impact on that stock would be placed in Category I. Fisheries that interact with a strategic stock and whose level of take has an insignificant impact on that stock, or interacts with a non-strategic stock at a level of take which has a significant impact on that stock are placed in Category II. A fishery that interacts only with non-strategic stocks and whose level of take has an insignificant impact on the stocks is placed in Category III.

Species listed under the Endangered Species Act present in the management area are listed below. Marine mammals not listed under the ESA that may be present in the BSAI and GOA management area include cetaceans, [minke whale (*Balaenoptera acutorostrata*), killer whale (*Orcinus orca*), Dall's porpoise

(Phocoenoides dalli), harbor porpoise (*Phocoena phocoena*), Pacific white-sided dolphin (*Lagenorhynchus obliquidens*), and the beaked whales (e.g., *Berardius bairdii* and *Mesoplodon spp*.)] as well as pinnipeds [Pacific harbor seal (*Phoca vitulina*), northern fur seal (*Callorhinus ursinus*), Pacific walrus (*Odobenus rosmarus*), spotted seal (*Phoca largha*), bearded seal (*Erignathus barbatus*), ringed sea (*Phoca hispida*) and ringed seal (*Phoca fasciata*)], and the sea otter (*Enhydra lutris*)].

Take of the above listed marine mammals in trawl fisheries has been monitored through the Observer Program. Steller sea lion, harbor seal, northern elephant seal, Dall's porpoise were species recorded as taken incidentally in the Gulf of Alaska groundfish trawl fisheries according to records dating back to 1990 (Hill et al 1997.) Steller sea lion, northern fur seal, harbor seal, spotted seal, bearded seal, ribbon seal, ringed seal, northern elephant seal, Dall's porpoise, harbor porpoise, Pacific white-sided dolphin, killer whale, sea otter, and walrus were recorded as taken incidentally in the BSAI groundfish trawl fisheries according to records dating back to 1990 (Hill et al 1997.) All groundfish fisheries under FMPs have been classified as Category III based on an insignificant level of fishery interactions with these species. However, the MMPA's proposed list of fishery categorization for 2002 would move the BSAI groundfish trawl fishery to Category II based on takes of Steller sea lion, humpback whales, and killer whales relative to the potential biological removal (PBR) levels established for those populations (Hill et al 1997).

Marine mammals were considered in groups that include: Steller sea lions, ESA listed great whales, other cetaceans, northern fur seals, harbor seals, other pinnipeds, and sea otters. Direct and indirect interactions between marine mammals and groundfish harvest occur due to overlap in the size and species of groundfish harvested in the fisheries that are also important marine mammal prey, and due to temporal and spatial overlap in marine mammal foraging and commercial fishing activities.

Impacts of the various proposed 2002 harvest levels are analyzed by addressing four core questions modified from Lowry (1982):

1. Does the proposed action result in increases in direct interactions with marine mammals (incidental take and entanglement in marine debris)?
2. Does the proposed action remove prey species at levels that could compromise foraging success of marine mammals (harvest of prey species)?
3. Does the proposed action result in temporal or spatial concentration of fishing effort in areas used for foraging by marine mammals (spatial and temporal concentration of removals with some likelihood of localized depletion)?
4. Does the proposed action modify marine mammal foraging behavior to the extent that population level impacts could occur (disturbance)?

The reference point for determining significant impact to marine mammals is predicting whether the proposed harvest levels will impact the current population trajectory of any marine mammal species. Criteria for determining significance and significance ratings for each question are summarized above.

Direct Effects - Incidental Take/Entanglement in Marine Debris

Annual levels of incidental mortality and serious injury are estimated by comparing the ratio of observed incidental take of dead animals to observed groundfish catch (stratified by area and gear type). Incidental bycatch frequencies also reflect locations where fishing effort is highest. In the Aleutian Islands and GOA, incidental takes are often within Steller sea lion critical habitat. In the Bering Sea takes are farther off shore and along the continental shelf. Otherwise there seems to be no apparent "hot spot" of incidental catch

disproportionate with fishing effort. It is, therefore, appropriate to estimate catch ratios based on estimated TAC. The projected level of take under all proposed alternatives is below that which would have an effect on marine mammal population trajectories Therefore, incidental bycatch frequencies are determined to be insignificant under all alternatives proposed.

Indirect Effects - Spatial and Temporal Concentration of Fishery
Spatial and temporal concentration effects by these fisheries have just been analyzed and modified to comply with Endangered Species Act considerations for Steller sea lions (NMFS 2001b). The criteria for insignificant effect determination is based on the assumption of the Steller sea lion protection measures analysis and section 7 biological opinion that the fishery as modified by SSL Protection Measures mitigates the impacts. That determination applies to all marine mammal species in these management areas.

Indirect Effects - Disturbance Effects
Vessel traffic, nets moving through the water column, or underwater sound production may all represent perturbations, which could affect marine mammal foraging behavior. Foraging could potentially be affected not only by interactions between vessel and species, but also by changes in fish schooling behavior, distributions, or densities in response to harvesting activities. In other words, disturbance to the prey base may be as relevant a consideration as disturbance to the predator itself. For the purposes of this analysis, we recognize that some level of prey disturbance may occur as a fisheries effect. The impact on marine mammals using those schools for prey is a function of both the amount of fishing activity and its concentration in space and time, neither of which may be extreme enough under any alternative to represent population level concerns. To the extent that fishery management measures do impose limits on fishing activities inside critical habitat, we assume at least some protection is provided from these disturbance effects. The criterion set for insignificant impacts is a similar level of disturbance as that which was occurring in 2001. Thus, the effect under all alternatives is insignificant according to the criteria set for significance.

Because of the recent change in Northern sea otter status it is being mentioned individually. Norther sea otters were designated by the US Fish and Wildlife Service (FWS) as candidate species under the ESA on August 22, 2000, in the Aleutian Islands (from Unimak Pass to Attu Island) (65 FR 67343). Funding has not been available to develop proposed rule making for listing the sea otter under the ESA. On August 21, 2001, the FWS was petitioned under the Marine Mammal Protection Act (MMPA) for the Alaska stock of sea otters to be listed as depleted. On November 2, 2001 (66 FR 55693), the FWS determined that the current population of sea otters throughout Alaska exceeds the optimum sustainable population of 60,000 animals and, therefore, does not meet the criteria to be listed as depleted under the MMPA. The FWS is continuing to evaluate the sea otter under both the ESA and MMPA. As far as interaction with the groundfish fisheries, NMFS observers monitored incidental take in the 1990–1995 groundfish trawl, longline, and pot fisheries. No mortality or serious injuries to sea otters were observed. All alternatives for this action will have insignificant impacts northern sea otter.

Alternative 1: Under this alternative, a lack of harvest monitoring removes significant incentives to comply with spatial and temporal concentration of these fisheries prescribed to protect marine mammals. The overall anticipated overfishing resulting from a lack of monitoring would likewise be expected to result in significant adverse effects that counteract protective measures designed to protect marine mammals. Additionally, observer information on federal groundfish fishery interactions with marine mammals will not be available, and any change in a trend would not be detected. It is unknown whether vessel traffic, nets moving through the water column, or underwater sound production which could affect marine mammal foraging behavior will be altered by this alternative.

Alternative 2: Under this alternative, observer information on federal groundfish fishery interactions with marine mammals will be available at the current levels. This is not expected to alter current rates of interaction, and any change in trend would be expected to be detected. Significant incentives for compliance with marine mammal protection management measures would remain in place. Spatial and temporal concentration effects by these fisheries, vessel traffic, nets moving through the water column, or underwater sound production which could affect marine mammal foraging behavior will not be altered by this alternative. Therefore, the effects of this alternative are considered insignificant.

Alternative 3: Under this alternative, observer information on federal groundfish fishery interactions with marine mammals will be available at the current levels. This is not expected to alter current rates of interaction, and any change in trend would be expected to be detected. Significant incentives for compliance with marine mammal protection management measures would remain in place. Spatial and temporal concentration effects by these fisheries, vessel traffic, nets moving through the water column, or underwater sound production which could affect marine mammal foraging behavior will not be altered by this alternative. Therefore, the effects of this alternative are considered insignificant.

4.1.4. Effects on Seabirds

Table 4-4a. Criteria used to estimate significance of effect on seabirds in the Bering Sea, Aleutian Islands, and Gulf of Alaska by Alternatives 1 - 3.

Intensity of effects	Significant Adverse	Significant Beneficial	Insignificant	Unknown
Incidental take	Take number and/or rate increases substantially and impacts at the population or colony level.	Take number and/or rate decreases substantially and impacts at the population or colony level.	Take number and/or rate is the same.	Take number and/or rate is not known.
Prey (forage fish) availability	Prey availability is substantially reduced and causes impacts at the population or colony level.	Prey availability is substantially increased and causes impacts at the population or colony level.	Prey availability is the same.	Changes to prey availability are not known.
Benthic habitat	Impact to benthic habitat is substantially increased and impacts at the population level or within critical habitat.	Impact to benthic habitat is substantially decreased and impacts at the population level or within critical habitat.	Impact to benthic habitat is the same.	Impact to benthic habitat is not known.
Processing waste and offal	Availability of processing wastes is substantially decreased and impacts at the population or colony level.	Availability of processing wastes is substantially increased and impacts at the population or colony level.	Availability of processing wastes is the same.	Changes in availability of processing wastes is not known.

Table 4-4b. Summary of impacts of alternatives 1-3 on seabirds.

Summary of Impacts:	Alternative 1	Alternative 2	Alternative 3
Incidental take	S-	I	I
Prey (forage fish) availability	S-	I	I
Benthic habitat	S-	I	I
Processing waste and offal	U	I	I

Discussion:
Seabird Groups and Effects to Consider: Given the sparse information, it is not likely that the fishery effects on most individual bird species are discernable. For reasons explained in the Steller Sea Lion Protection Measures SEIS (NMFS 2001c), the following species or species groups are considered: northern fulmar, short-tailed albatross, spectacled eider, and Steller's eiders, albatrosses and shearwaters, piscivorous seabird species, and all other seabird species not already listed. The fishery effects that may impact seabirds are direct effects of incidental take (in gear and vessel strikes), and indirect effects on prey (forage fish) abundance and availability, benthic habitat, and processing waste and offal.

Direct Effects - Incidental take. The effects of incidental take of seabirds (from fishing gear and vessel strikes) are described in Section 4.3.3 of the Draft Programmatic SEIS (NMFS, 2001a). Birds are taken incidentally in longline, trawl, and pot gear, although the vast majority of that take occurs in the longline fisheries and is comprised primarily of the following species or species groups: fulmars, gulls, shearwaters, and albatrosses. Therefore, this analysis of incidental take focuses primarily on the longline fisheries and those species.

As noted in Section 4.3.3.1 of the Draft Programmatic SEIS (NMFS, 2001a), several factors are likely to affect the risk of seabird incidental catch. It is reasonable to assume that risk goes up or down, partly as a consequence of fishing effort (measured as total number of hooks) each year (NMFS 2001a). But, if seabird avoidance measures used to prevent birds from accessing baited hooks are effective, then effort levels would probably be less of a critical factor in the probability of a bird getting hooked. Seabird bycatch avoidance measures are outlined on page 4.3-8 of the Draft Programmatic SEIS (NMFS, 2001a).

Indirect Effects - Prey (forage fish) abundance and availability. A description of the effects of prey abundance and availability on seabirds is in Section 4.3.3 of the Draft Programmatic SEIS (NMFS, 2001a). Detailed conclusions or predictions cannot be made, however, the present understanding is fisheries management measures affecting abundance and availability of forage fish or other prey species could affect seabird populations (NMFS, 2001a; NMFS, 2001c).

Indirect Effects - Benthic habitat. The indirect fishery effect on benthic habitat as utilized by seabirds are described in Section 4.3.3.1 of the Draft Programmatic SEIS (NMFS, 2001a). The seabird species most likely to be impacted by any indirect gear effects on the benthos would be diving sea ducks such as eiders and scoters as well as cormorants and guillemots (NMFS, 2001c). Bottom trawl gear has the greatest potential to indirectly affect seabirds via their habitat. Thus, the remainder of this analysis will be limited to the impacts of bottom trawl gear on foraging habitat.

Indirect Effects - Processing waste and offal. The volume of offal and processing wastes probably changes approximately in proportion to the total catch in the fishery. Whereas some bird populations may benefit from the food supply provided by offal and processing waste, the material also acts as an attractant that may lead to increased incidental take of some seabird species (NMFS 2001c). This impact would need to be considered in the balance of the beneficial and detrimental impacts of the disposal actions.

Criteria used to determine significance of effects on seabirds Significance of impacts is determined by considering the context in which the action will occur and the intensity of the action. When complete information is not available to reach a strong conclusion regarding impacts, the rating of 'unknown' is used. Table 6 above outlines the qualitative significance criteria or thresholds that are used for determining if an effect has the potential to create a significant impact on seabirds.

Alternative 1: Under this alternative, observer information on federal groundfish fishery interactions with seabirds will not be available. This does not by itself constitute an implied alteration of current rates of interactions, rather that any change in a trend may not be detected. However, the overfishing anticipated to result from a lack of harvest monitoring would be expected to result in adversely significant effects on seabirds, such as a proportional increase in incidental takes. Indirect effects by fisheries on prey (forage fish) abundance and availability, benthic habitat as utilized by seabirds would similarly be expected to be adversely affected by this alternative. The effects of this alternative on processing of waste and offal, all of which could affect seabirds, is unknown.

Alternative 2: Under this alternative, observer information on federal groundfish fishery interactions with seabirds will be available at the current levels. However, this does not by itself constitute an implied alteration of current rates of interactions, rather that any change in a trend may be detected. Indirect effects by fisheries on prey (forage fish) abundance and availability, benthic habitat as utilized by seabirds, and processing of waste and offal, all of which could affect seabirds, are not expected to be impacted by this alternative. Therefore, the effects of this alternative are considered insignificant.

Alternative 3: Under this alternative, observer information on federal groundfish fishery interactions with seabirds will be available. However, this does not by itself constitute an implied alteration of current rates of interactions, rather that any change in a trend may be detected. Indirect effects by fisheries on prey (forage fish) abundance and availability, benthic habitat as utilized by seabirds, and processing of waste and offal, all of which could affect seabirds, are not expected to be impacted by this alternative. Therefore, the effects of this alternative are considered insignificant.

4.2 Habitat impacts

Inclusively all the marine waters and benthic substrates in the management areas comprise the habitat of all marine species. Additionally the adjacent marine waters outside the EEZ, adjacent State waters inside the EEZ, shoreline, freshwater inflows, and atmosphere above the waters, constitutes habitat for prey species, other life stages, and species that move in and out of, or interact with, the fisheries' target species, marine mammals, seabirds, and the ESA listed species.

4.2.1 Impacts on Benthic Habitat

Table 4-5 Summary of impacts of alternatives 1-3 on benthic habitat.

Summary of Impacts:	Alternative 1	Alternative 2	Alternative 3
Removal of or damage to HAPC	S-	I	I
Modification of nonliving substrate, and/or damage to small epifauna and infauna by fishing gear	S-	I	I
Change in benthic biodiversity	S-	I	I

This analysis focuses on the effects of monitoring fishing at the 2002 TAC levels on benthic habitat important to commercial fish species and their prey. The analysis also provides the information necessary for an EFH

(Essential Fish Habitat) assessment, which is required by the Magnuson-Stevens Act for any action that may adversely affect EFH. Two issues of concern with respect to EFH effects are the potential for damage or removal of fragile biota that are used by fish as habitat, the potential reduction of habitat complexity, which depends on the structural components of the living and nonliving substrate; and potential reduction in benthic diversity from long-lasting changes to the species mix.

The following criteria are used to rate each alternative as to whether it may have significant effects in three ways:

1. Removal of or damage to Habitat Areas of Particular Concern (HAPC) biota by fishing gear
2. Modification of nonliving substrate, and/or damage to small epifauna and infauna by fishing gear
3. Change in benthic biodiversity

The reference point against which the criteria are applied is the current size and quality of marine benthic habitat and other essential fish habitat.

Table 4-6: Habitat indicators of ecosystem function used in significance determination for alternatives 1-3 on benthic habitat

Groundfish bottom trawling effort in GOA	bottom trawl time in 2000 similar to 1999; lower than 1990-1997
Groundfish bottom trawling effort in EBS	bottom trawl time in 2000 increased relative to 1999
Groundfish bottom trawling effort in AI	decreasing since 1990
Area closed to trawling	more closed area in 2000 than 1999
HAPC biota bycatch by all gears	BSAI: lower than 1997-98; GOA: constant since 1997

Alternative 1: The overfishing anticipated to result from a lack of harvest monitoring could be expected to result in adversely significant effects on the benthic habitat. A corresponding increase could be reasonably be expected to be seen in removal of or damage to Habitat Areas of Particular Concern (HAPC) biota by fishing gear, modification of nonliving substrate, and/or damage to small epifauna and infauna by fishing gear, and a change in benthic biodiversity.

Alternative 2: The current rate of monitoring of harvest levels, which provides sufficient information to allow appropriate management measures to be enacted to keep harvest within specified TAC levels, is expected in have an insignificant effect on the benthic habitat.

Alternative 3: The current rate of monitoring of harvest levels, which provides sufficient information to allow appropriate management measures to be enacted to keep harvest within specified TAC levels, is expected in have an insignificant effect on the benthic habitat.

4.2.2 Impacts on Essential Fish Habitat (EFH)

Any fishing under each of the alternatives has the potential for benthic disturbances that could result in regional adverse effects on EFH, or to a component of EFH such as certain HAPC biota. In previous EFH consultations such as on the Steller Sea Lion Protection Measures (NMFS 2001e), comments with respect to mitigation have been to the effect that the Council has taken numerous actions to protect vulnerable areas, or

to protect sensitive life stages of species by curtailing fishing at different times and in different areas. Given that mitigation measures to minimize effects on EFH have been undertaken through ongoing fishery management measures whose principal goal was to protect and rebuild groundfish stocks, but whose results have also resulted in a benefit to habitat for all managed species, the NMFS Habitat Conservation Division stated that it believes that any potential significant adverse effects by groundfish fishing have been minimized to the extent practicable. The specified 2002 TAC levels would have impacts beyond those displayed in previous analyses of the effects of these groundfish fisheries on marine benthic habitat, therefore, ratings of insignificant were made for 2002 TAC specifications.

Alternative 1: The overfishing anticipated to result from a lack of harvest monitoring could be expected to result in adversely significant effects on EFH.

Alternative 2: Monitoring harvest levels is expected to allow effective management to keep harvest levels within TAC specifications. Harvest at those levels is expected to have an insignificant effect on the EFH.

Alternative 3: Monitoring harvest levels is expected to allow effective management to keep harvest levels within TAC specifications. Harvest at those levels is expected to have an insignificant effect on the EFH.

4.3 Endangered Species Act considerations

The Endangered Species Act of 1973 as amended (16 U.S.C. 1531 *et seq*; ESA), provides for the conservation of endangered and threatened species of fish, wildlife, and plants. The program is administered jointly by the NMFS for most marine mammal species, marine and anadromous fish species, and marine plant species and by the USFWS for bird species, and terrestrial and freshwater wildlife and plant species.

The designation of an ESA listed species is based on the biological health of that species. The status determination is either threatened or endangered. Threatened species are those likely to become endangered in the foreseeable future [16 U.S.C. § 1532(20)]. Endangered species are those in danger of becoming extinct throughout all or a significant portion of their range [16 U.S.C. § 1532(20)]. Species can be listed as endangered without first being listed as threatened. The Secretary of Commerce, acting through NMFS, is authorized to list marine fish, plants, and mammals (except for walrus and sea otter) and anadromous fish species. The Secretary of the Interior, acting through the USFWS, is authorized to list walrus and sea otter, seabirds, terrestrial plants and wildlife, and freshwater fish and plant species.

In addition to listing species under the ESA, the critical habitat of a newly listed species must be designated concurrent with its listing to the "maximum extent prudent and determinable" [16 U.S.C. § 1533(b)(1)(A)]. The ESA defines critical habitat as those specific areas that are essential to the conservation of a listed species and that may be in need of special consideration. Federal agencies are prohibited from undertaking actions that destroy or adversely modify designated critical habitat. Some species, primarily the cetaceans, which were listed in 1969 under the Endangered Species Conservation Act and carried forward as endangered under the ESA, have not received critical habitat designations.

Federal agencies have an affirmative mandate to conserve listed species (Rohlf 1989). One assurance of this is Federal actions, activities or authorizations (hereafter referred to as Federal action) must be in compliance with the provisions of the ESA. Section 7 of the Act provides a mechanism for consultation by the Federal

action agency with the appropriate expert agency (NMFS or USFWS). Informal consultations, resulting in letters of concurrence, are conducted for Federal actions that have no adverse affects on the listed species. Formal consultations, resulting in biological opinions, are conducted for Federal actions that may have an adverse affect on the listed species. Through the biological opinion, a determination is made as to whether the proposed action poses "jeopardy" or "no jeopardy" of extinction to the listed species. If the determination is that the action proposed will cause jeopardy, reasonable and prudent alternatives may be suggested which, if implemented, would modify the action to no longer pose the jeopardy of extinction to the listed species. These reasonable and prudent alternatives must be incorporated into the Federal action if it is to proceed. A biological opinion with the conclusion of no jeopardy will contain an incidental take statement if a likelihood exists of any taking[1] occurring during promulgations of the action. The incidental take statement is appended to a biological opinion and provides for the amount of take that is expected to occur from normal promulgation of the action. An incidental take statement is not the equivalent of a permit to take. Further, if incidental take is expected, then reasonable and prudent measures are specified that are necessary or appropriate to minimize the impact of the take (50 CFR 402.14(i)). A biological opinion with the conclusion of no jeopardy may contain a series of conservation recommendations intended to further reduce the negative impacts to the listed species. These management measures are advisory to the action agency (50 CFR 402.14(j)).

Though all the federal fishery actions have been through Section 7 consultations, it is periodically necessary to re-initiate Section 7 consultations. We typically view any subsequent action (such as consideration of a new fishery management plan amendment or a new regulatory action) as a point where the determination of whether to re-initiate or not should be made. The regulations state: "Re-initiation of formal consultation is required and shall be requested by the Federal agency or by the Service, where discretionary Federal involvement or control over the action has been retained or is authorized by law and: (a) If the amount or extent of taking specified in the incidental take statement is exceeded; (b) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; (c) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or (d) If a new species is listed or critical habitat designated that may be affected by the identified action." (50 CFR 402.16).

Currently, 23 marine species occurring in the GOA and/or BSAI groundfish management areas are listed as endangered or threatened under the ESA (Table 8). The group includes seven great whales, one pinniped, eleven Pacific salmon and steelhead, and three seabirds.

[1] the term "take" under the ESA means "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or attempt to engage in any such conduct" [16 U.S.C. § 1538(a)(1)(B)].

Table 4-7. Species listed as endangered or threatened under the ESA and occurring in the GOA and/or BSAI groundfish management areas.

Common Name	Scientific Name	ESA Status
Northern Right Whale	*Balaena glacialis*	Endangered
Bowhead Whale [1]	*Balaena mysticetus*	Endangered
Sei Whale	*Balaenoptera borealis*	Endangered
Blue Whale	*Balaenoptera musculus*	Endangered
Fin Whale	*Balaenoptera physalus*	Endangered
Humpback Whale	*Megaptera novaeangliae*	Endangered
Sperm Whale	*Physeter macrocephalus*	Endangered
Snake River Sockeye Salmon	*Onchorynchus nerka*	Endangered
Short-tailed Albatross	*Phoebastria albatrus*	Endangered
Steller Sea Lion	*Eumetopias jubatus*	Endangered and Threatened [2]
Snake River Fall Chinook Salmon	*Onchorynchus tshawytscha*	Threatened
Snake River Spring/Summer Chinook Salmon	*Onchorynchus tshawytscha*	Threatened
Puget Sound Chinook Salmon	*Onchorynchus tshawytscha*	Threatened
Lower Columbia River Chinook Salmon	*Onchorynchus tshawytscha*	Threatened
Upper Willamette River Chinook Salmon	*Onchorynchus tshawytscha*	Threatened
Upper Columbia River Spring Chinook Salmon	*Onchorynchus tshawytscha*	Endangered
Upper Columbia River Steelhead	*Onchorynchus mykiss*	Endangered
Snake River Basin Steelhead	*Onchorynchus mykiss*	Threatened
Lower Columbia River Steelhead	*Onchorynchus mykiss*	Threatened
Upper Willamette River Steelhead	*Onchorynchus mykiss*	Threatened
Middle Columbia River Steelhead	*Onchorynchus mykiss*	Threatened
Spectacled Eider	*Somateria fishcheri*	Threatened
Steller's Eider	*Polysticta stelleri*	Threatened

[1] The bowhead whale is present in the Bering Sea area only.

[2] Steller sea lion are listed as endangered west of Cape Suckling and threatened east of Cape Suckling.

Of the species listed in Table 8, groundfish fishing has been determined to negatively effect Steller sea lions. NMFS is the expert agency for ESA listed marine mammals, and USFWS is the expert agency for ESA listed seabirds. The proposed action, continuance of the Observer Program structure and authority, upon the current expiration date of December 31, 2002, and implementation of revised observer provider company and observer permitting processes and performance standards, and granting of authority to place NMFS staff aboard vessels and at plants for the purpose of promoting Observer Program improvements, must be in compliance with the ESA.

Section 7 consultations have been done for all the above listed species, some individually and some as groups. (For groundfish actions see the SEIS, section 3.8, for summaries of all previous section 7 consultations and Biological Opinions (NMFS 1998). None of the alternatives considered for this proposed rule re expected to have an impact on endangered, threatened, or candidate species. The purpose of this rule is to ensure the continuation and improvement of a monitoring program that contributes to our assessment of potential interactions of Federal groundfish fisheries with endangered and threatened species. To the extent to which this purpose is achieved, this action will benefit rather than harm endangered and threatened species.

4.4 Socio-economic Effects

Socio-economic effects of each of the alternatives are described in the Regulatory Impact Review, found in Section 5.0 of this document.

4.5 Cumulative Effects

State and federally regulated marine fisheries are unlikely to cause cumulative effects beyond those described in the 2001 draft Programmatic SEIS for the biological component of the BSAI and the GOA and direct, indirect, and cumulative effects described in the EA for the Total Allowable Catch Specifications for the Year 2002 Alaska Groundfish Fisheries.

4.6 Coastal Zone Management Act Consideration

Implementation of the emergency rule would be conducted in a manner consistent, to the maximum extent practicable, with the Alaska Coastal Management Program within the meaning of section 30(c)(1) of the Coastal Zone Management Act of 1972 and its implementing regulations.

5.0 Regulatory Impact Review

5.1 Description of the Management Objectives

The objective of the proposed management actions are to ensure that the Observer Program will continue to perform its critical scientific, conservation and management functions and to do so more effectively. Data provided by the Observer Program is a critical element in the conservation and management of groundfish, other living marine resources, and their habitat. For example, these data are used for: (1) assessing the status of groundfish stocks; (2) setting and monitoring groundfish quotas; (3) monitoring the bycatch of non-groundfish species; (4) assessing the effects of the groundfish fishery on other living marine resources and their habitat; and (5) assessing methods for improving the conservation and management of groundfish, other living marine resources and their habitat. Due to the critical uses of observer data, it is essential that the Observer Program be extended beyond 2002 and that the Observer Program be improved by addressing both perceived and actual sources of data quality problems.

5.2 Description of the Fishery

The different classes of groundfish fishing and processing operations that might be affected by these regulations are described in detail in Section 3.10 (Social and Economic Conditions) of the Alaska Groundfish Fisheries Draft Programmatic Supplemental Environmental Impact Statement (PSEIS) (NMFS, 2001). Sub-section 3.10.2 provides extremely detailed fishing and processing sector profiles. Considerable additional detail is contained in Appendix I of the PSEIS, "Sector and Regional Profiles of the North Pacific Groundfish Fisheries." Brief descriptions of the relevant fleet sectors are included in Appendix B of this EA/RIR/IRFAA. Readers interested in additional detail are referred to the PSEIS.

In addition to affecting the groundfish fishing industry, the alternatives and options considered in this document would affect the current and future observer providers (contractors) and observers. Option 2 would also affect groundfish vessels less than 60 feet LOA and all halibut vessels, because it would give NMFS the authority to place NMFS staff or other qualified persons on any vessel participating in the BSAI and GOA groundfish fisheries or the Alaska halibut fishery. Brief descriptions of the observer provider companies and the halibut fleet are included in Appendix B.

Table 5.1 summarizes information about the numbers of groundfish fishing operations affected by the alternatives. As noted above, all of the alternatives and options would directly affect the observer provider companies and observers. With Option 2, groundfish fishing vessels less than 60 feet LOA and all vessels in the halibut fishery would be directly affected. In recent years, there have been five to six observer providers and just under 400 individuals were employed annually as observers. Many of the halibut vessels also participate in the groundfish fishery and are accounted for above. Table 5.2 provides estimates of the numbers of vessels by size class that participated in the halibut IFQ fishery and the number of those vessels that did not participate in the groundfish fishery.

5.3 Problem Statement

The information provided by the Observer Program has had a key role in the success of the groundfish management regime and much of that regime was built with the understanding that the Observer Program would continue to exist. For example, the prohibited species catch (PSC) limits, which have been a key factor in controlling the bycatch of prohibited species, could not be used without the Observer Program. Similarly,

it would not be possible to monitor total allowable catches (TACs) in terms of total catch without the Observer Program. In addition, much of the information that is used to assess the status of groundfish stocks, to monitor the interactions between the groundfish fishery and marine mammals and sea birds, and to analyze fishery management actions is provided by the Observer Program.

Unless action is taken, the regulations that authorize and implement the Observer Program will expire at the end of 2002. Therefore, there is a need to extend the regulations that authorize and implement the Observer Program. There is also a need to improve those regulations in order to continue to address the deficiencies of the existing service delivery model and regulations. Such improvements are necessary to maintain or increase the quality of the data provided by the Observer Program.

A more detailed discussions of the problems are in Sections 1.1, 1.2, and 3. Section 3 includes a discussion of each problem the alternatives and the specific elements of Options 1 and 2 are intended to address.

5.4 Description of the Alternatives

The regulations that authorize and implement the North Pacific Groundfish Observer Program (Observer Program) expire December 31, 2002. This regulatory analysis package addresses three alternatives. They are: (1) allow the regulations and the Observer Program to expire (the no action alternative); (2) extend the regulations indefinitely with the expectation that they would be amended periodically to maintain or increase the effectiveness and efficiency of the Observer Program; and (3) extend the regulations through December 31, 2007. In addition, two complementary options for improving the existing regulations are addressed. The options would: (1) increase NMFS' management controls over observer providers and observers by strengthening the regulations governing the relationship between NMFS and the observer providers and observers; and (2) increase the ability of NMFS to interact effectively with observers, fishermen, and processing plant employees by granting to NMFS the authority to place NMFS staff and other qualified persons aboard groundfish and halibut vessels and at groundfish plants.

The alternatives, options, and sub-options are described in detail in Section 2. Regulatory changes that were considered but rejected during the development of Alternatives 2 and 3 and Options 1 and 2 are discussed in Appendix C.

5.5 Impacts of the Alternatives

5.5.1 Alternative 1. No Action Alternative

Under this alternative, the Observer Program, as it currently exists, including all coverage requirements and implementing regulations, would expire on December 31, 2002 and would not be renewed. This would eliminate the Observer Program as a mechanism for providing information that is used to support the fishery conservation and management activities described in Section 1 and in Appendix A. Without these data, the current accuracy of annual stock assessments, estimation of discard rates and prohibited species bycatch, overall annual total catch accounting, and analyses of alternative conservation and management actions, as well as reliable in-season management of the various fisheries would not be possible. Programs, such as the CDQ and AFA programs, which rely principally on observer data for individual vessel catch accounting, would need to be completely restructured. These problems could result in significant erosion of overall confidence in the management of the federally managed fisheries in Alaska.

Much of the current groundfish management regime is based on the assumption that information will continue to be provided by the Observer Program. Therefore, some fundamental changes would have to be made to the management regime. The effects of those changes would be addressed in the regulatory analysis documents that would have to be prepared to implement such changes. It is assumed that an alternate Observer Program structure would eventually replace the expired Observer Program; however, no effective target date for implementation of such an alternative has been established, none would be required, and past experience has demonstrated the difficulty of developing and implementing an alternative Observer Program. In the intervening period, should the current program expire, very severe and costly disruptions of these economically important fisheries would be unavoidable. While an estimate of these costs and associated dislocations cannot be made, given available data, they would clearly be very substantial and wide ranging. In the absence of the observer data, or some equivalent alternative source of fishery data, NMFS could not fulfill its conservation and management obligations, as prescribed under the MSA and other law.

Fishery managers would be expected to make more conservative decisions, in the absence of observer data. Inaccurate catch accounting may result in fishery closures occurring before allocations are reached, or after quotas are exceeded. Both would impose direct and real costs on society. For example, the industry could see losses of revenue from the potential mis-allocation of Total Allowable Catch (TAC). Premature closures decrease catch and adversely impact product supply and prices paid by consumers. Conversely, delayed closures result in quotas being exceeded and potentially adverse long term implications for fishery productivity. While these costs cannot be readily estimated, they do represent a real potential loss associated with Alternative 1.

The direct and indirect costs to the fishing industry of deploying observers, and the associated income of observer providers and observers, and other costs that accrue to the fishing industry would be eliminated with Alternative 1. The direct annual cost to industry is almost $13 million, but no estimates of the indirect costs are available. In 2000, this direct cost was about 1 percent of the revenue from groundfish products, through primary processing. Therefore, if catch and production were decreased by more than 1 percent, to implement more conservative management in the absence of the Observer Program, and if catch and gross revenue decrease proportionately, the reduction in gross revenue from the groundfish industry would exceed the $13 million direct cost reduction to the industry.

It is estimated that eliminating the Observer Program would decrease the gross revenue of observer providers and the income of observers by about $11 million and $5 million, respectively. It is reasonable to assume that some observer providers could go out of business with the loss of the groundfish Observer Program and that other observer providers would incur substantial losses during their transition period.

Current annual expenditures by NMFS on the Observer Program are approximately $3 million. This includes expenditures for the Observer Program Office, General Counsel, and Enforcement. A portion of this money is identified by Congress specifically for the Observer Program and the remainder is from NMFS operating funds. These funds would be expected to be redirected or eliminated under this alternative. Staff not directly involved in program restructuring also would be expected to be redirected to other program priorities. After those changes had been completed, the start up cost for a new observer program could be substantial, and reorganizing staff and Observer Program internal programs would be administratively extremely burdensome and time consuming.

With Alternative 1, additional costs to NMFS could include the potential inability to accurately manage the fisheries, due to a lack of reliable data. This lack of data would negatively impact the reliability of in-season

management decisions, stock assessments, and the analyses of methods to improve the conservation and management of groundfish and other marine assets. This would impose potentially significant adverse effects on living marine resources, their habitat, the industry, and the nation as a whole. This could place the agency in a position of non-compliance with mandated requirements of the MSA, MMPA, ESA, RFA, and other laws.

The widespread support for the Observer Program among the stakeholders in the BSAI and GOA groundfish fishery suggests that the elimination of the Observer Program would result in net losses to various groups of stakeholders and to the Nation as a whole. The stakeholders who have supported the groundfish Observer Program include: (1) groundfish fishermen and processors; (2) commercial halibut, salmon, crab, and herring fishermen; (3) subsistence and recreational fishermen; (4) the managers of groundfish and other marine assets; (5) residents of fishing communities; (6) the environmental community; (7) observer providers and observers; (8) Congress, (9) CDQ groups, and (10) the states represented on the Council.

5.5.2 Alternative 2: Extend the Current Groundfish Observer Program Indefinitely Beyond 2002

This alternative would extend, without expiration, the current groundfish observer coverage requirements and implementing regulations for the Observer Program infrastructure that are set to expire December 31, 2002. The Council and NMFS would be expected to amended these regulations periodically, to maintain or increase the effectiveness and efficiency of the Observer Program. Therefore, the Observer Program would continue to provide critical information for the conservation and management of groundfish, other living marine resources, and their habitat. The groundfish management regime, that was developed based on the assumption that the Observer Program will continue to provide critical information, could continue to operate without the fundamental changes and costs that would be required if the Observer Program were eliminated. In addition, Alternative 2 would allow for a long term modification of the program structure, which would address identified program deficiencies.

5.5.2.1 Impacts on Industry

Under this alternative, the level of required observer coverage established in regulations directly affects costs to industry. Based on information provided by observer providers and a salary range for observers that approximates the 2001 unionized salary rate, the total cost per observer day, under Alternative 2, is estimated at $350. This includes $305/day average rate including Level 1 and Level 2 observers; an estimate of $30/day for airfare, possibly hotel, and other incidental expenses passed on to industry by observer providers; and $15/day for meals, a direct expense to vessels. Industry has indicated that they may sometimes pay more than $350/day for an observer. These costs vary on a case-by-case basis depending on duration of observer coverage and observer logistics. A salary increase for observers of approximately $5/day will occur in 2002 and again in 2003 under the current three-year contracts negotiated between the observers' union and each of several observer providers. This is expected to increase the cost per observer day by about $7.50 in 2002 and again in 2003. The cost per observer day is also expected to increase in 2002 due to increased insurance costs for observer providers. NMFS assumes that these costs will be passed on to industry by the observer providers.

The indirect costs to industry include the following: (1) increased operating costs that result from the inconvenience of accommodating an observer and (2) foregone catch, production, and revenue resulting from the loss of a berth for crew, and lost fishing time while waiting for an observer to arrive in port.

Based on an estimate of 36,500 observer deployment days per year and the previously cited estimated cost

per observer day, the total industry costs for observer coverage under Alternative 2 is estimated to be $12.8 million, for 2001, and about $13 million and $13.3 million in 2002 and 2003, respectively, not including the additional insurance costs. Estimates of the number of observer deployment days and direct cost to the industry by vessel category and for shoreside processing plants for 1999 and 2000 were presented in Section 3.2, Table 3.1. Table 3.2 provides comparisons of the cost estimates to estimates of ex-vessel revenue for catcher vessels, and to groundfish product revenue through primary processing for processors.

Under the proposed action, observer costs are based on whether or not an observer is aboard, and on overall coverage needs. Higher costs are borne by those vessels and plants that require higher levels of coverage. The estimates in Tables 3.2 indicate that for catcher vessels, observer cost as a percent of groundfish ex-vessel revenue, in 2000, averaged a low of 1.5 percent for trawlers between 60' and 124' LOA, and a high of 3.5 percent for pot vessels greater than 124' LOA.

For catcher/processors, observer cost as a percent of groundfish product revenue, in 2000, averaged a low of 0.5 percent for surimi trawlers, and a high of 2.0 percent for longliners greater than 124' LOA. The estimates also suggest that there are some differences in these averages for vessels that only fished in either the GOA or BSAI.

The corresponding estimate for shoreside processors is 0.3 percent. For fishing vessels in each of the two observer coverage categories (i.e., 30% or 100% coverage), the direct observer cost as a percent of groundfish ex-vessel (product) revenue for catcher (catcher/processor) vessels decreases as its average revenue per day increases. Therefore, to the extent that revenue per day in a particular fishery is correlated with vessel size, smaller vessels tend to have a larger observer cost burden, relative to their groundfish revenue.

The direct observer cost are compared to gross revenue because the cost data required to estimate net revenue are not available. The direct observer costs are obviously much larger relative to net revenue.

The distribution of observer costs is viewed by many to be inequitable for one or both of the following reasons. First, although all participants in the groundfish, halibut, herring, salmon, and crab fisheries benefit from the groundfish Observer Program, only the participants in the groundfish fishery with observer coverage requirements bear the cost. Second, among the groundfish fishing or processing operations that pay for observer coverage, the cost to each operation is not related to either the benefits it receives from the Observer Program or its ability to pay for observer coverage. Its cost is determined principally by its observer coverage requirements and the cost per day of obtaining observer services from an observer.

5.5.2.2. Impacts on Observer Companies

With Alternative 2, observer providers would continue to provide approximately the current level of observers services or about 36,500 observer deployment days per year.

5.5.2.3 Impacts on NMFS and the Nation

Continuation of the current program structure would guarantee that NMFS will continue to have access, in a timely manner, to the data that are necessary for the continued effective conservation and management of BSAI and GOA groundfish and other marine assets.

The Council established a sunset date for the program structure, implemented in 1996, as an incentive to

develop and implement an alternate structure that addresses the concerns that were the impetus for the development of the Research Plan and the joint project agreement (JPA) with the Pacific States Marine Fisheries Commission. However, because of other Council and NMFS priorities, work on developing an overall alternate program structure has been delayed. A sunset date was re-established with each program extension, in 1998 and 2000. These interim program sunset dates have resulted in an administrative rulemaking burden to renew the interim program implementing regulations; they did not provide an effective incentive to improve the Observer Program.

In light of the failure of the Research Plan and JPA initiatives, NMFS believes that a more successful approach is to make incremental improvements to the Observer Program, while attempting to develop the more fundamental structural changes that will be required to address the source of many of the current deficiencies of the Observer Program. A list of the various needs that must be addressed in any overall program restructuring includes, at a minimum: (1) an alternate funding mechanism that breaks the direct financial relationship between industry and the observer providers, and which fairly shares the cost burden between industry sectors; (2) improved observer coverage efficiency; (3) appropriate management controls over observer providers; (4) an assured high level of data quality; and (5) support for the safety and well being of observers. The development and implementation of solutions for each of these areas will be significant actions. Removal of an expiration date for what has been considered an interim program since 1996, will reduce the rulemaking burden associated with renewing the program every few years, thereby freeing staff resources to help develop and implement the needed program changes. This alternative provides increased opportunity for the needed changes to be achieved. The benefits of this would be shared by industry, observers, observer providers, NMFS, and the Nation.

Possible negative impacts of extending the current Interim Program without an expiration date may include an initial general perception of a lack of interest in addressing the problems inherent in the current system structure, such as, but not limited to, potential for conflicts of interest, inequitable costs of observer coverage, and inflexible coverage requirements. However, that would be offset by concrete progress by the Council and NMFS in developing a comprehensive list of issues to be addressed, together with a development and implementation schedule for those actions. This would necessarily be followed by the initiation of efforts to achieve implementation. The possibility of other NMFS and Council priorities forestalling these efforts always exists, as has been shown over the last several years, and therefore should not be considered as an obstacle unique to this alternative.

5.5.3 Alternative 3: Extend the Current Groundfish Observer Program through December 31, 2007

This alternative would extend the current Observer Program regulations through December 31, 2007. The regulations would be expected to be amended during the next five years, as necessary, to maintain or increase the effectiveness and efficiency of the Observer Program through and beyond the end of 2007. Therefore, the Observer Program would continue to provide critical information for the conservation and management of groundfish, other living marine resources, and their habitat. The groundfish management regime, that was developed based on the assumption that the Observer Program will continue to provide critical information, could continue to operate without the fundamental changes and costs that would be required if the Observer Program were eliminated. The principal difference between Alternatives 2 and 3 is that Alternative 3 would not eliminate the administrative burden of rulemaking to extend the Observer Program authority beyond 2007. In the past, the Council has advocated expiration dates for the Observer Program under the premise that these dates provide an incentive to NMFS and the Council for making desired changes to the program. In reality, expiration dates create an emergency mode for rulemaking to extend the program if complex legal or

procedural issues have not been adequately ferreted out or implemented within a time frame prior to expiration of the program. However, if other changes to the Observer Program regulations are expected to be necessary before 2007, then the rulemaking required for those changes could extend the Observer Program regulations beyond 2007 and perhaps indefinitely. In that case, there would be almost no additional rulemaking burden with Alternative 3 and, therefore, there would be little real difference between Alternatives 2 and 3 or between their impacts.

5.5.4 Option 1 for Alternatives 2 and 3: Increase NMFS' Management Controls over Observer Providers and Observers

Option 1 would increase NMFS' management controls over observer providers and observers and, therefore, maintain or increase the quality of the data provided by the Observer Program. It would do this by: (1) changing the process for certifying and decertifying observer providers and observers to ensure that the process is compliant with the APA; (2) clarifying the criteria, duties, responsibilities, and standards of conduct for observer providers and observers; (3) eliminating ineffective or unnecessary requirements; and (4) adding new requirements to better address performance issues of particular concern.

5.5.4.1 Impacts on Industry

Overall, the elements of Option 1 would be expected to increase the direct cost of observer coverage to the industry, improve the quality of the data provided by the Observer Program, and improve communications and the working relationships among the industry, observer providers, observers, and Observer Program Office staff. The increase in direct costs is expected to be minimal because the cost effects of the individual elements will be partially offsetting. That is, some of the proposed changes in Option 1 would increase direct costs but others would decrease them. The expected effects are discussed by element in Section 3.4.

5.5.4.2 Impacts on Observers

Option 1 would benefit observers by increasing NMFS support for observers. The increase in support is addressed in Section 3.6.

5.5.4.3 Impacts on Observer Provider Companies

Option 1 would clarify and strengthen the duties and responsibilities of observer providers, provide an APA compliant process for granting observer provider permits and for enforcing the regulations for observer providers. A marginal increase in the total cost of providing observers would be expected. Some of the proposed changes in Option 1 would increase costs for observer providers but others would decrease them. Option 1 would be expected to benefit observer providers by improving communications and the working relationships among the industry, observer providers, observers, and Observer Program Office staff. A more detailed discussion of the impacts of Option 1 is in Section 3.4.

5.5.4.4. Impacts on NMFS and the Nation

By increasing NMFS' management controls over observer providers and observers, Option 1 is expected to increase the quality of the data provided by the Observer Program. This would result in more informed decision and, therefore, improvements concerning the conservation and management of BSAI and GOA groundfish and other marine assets. The data quality effects of each element of Option 1 or of all the elements

combined cannot be quantified. The same is true of the potential benefits from improved conservation and management. However, each element of Option 1 was selected to decrease one or more deficiencies of the current Observer Program regulations.

It is estimated that Option 1 would increase Observer Program Office, General Counsel, and Enforcement annual costs by approximately $0.3 million. However, some of this additional cost would be justified to improve compliance even if none of the changes of Option 1 were made.

5.5.5 Option 2 for Alternatives 2 and 3: Grant NMFS the Authority to Place NMFS Staff and Other Qualified Persons Aboard Vessels and at Plants

Option 2 was developed by NMFS to allow a more effective use of NMFS staff and other qualified persons with respect to meeting the mission of the Observer Program. More specifically, Option 2 would: (1) increase the ability of NMFS to work with industry, observers and observer providers to resolve the many issues that face the stakeholders in the North Pacific; (2) increase its ability to prepare for future data needs and develop sampling regimes and special projects that satisfy the needs of NMFS many clients; and (3) foster a more cooperative working relationship with better informed participants. It would do this by granting to NMFS the authority to place NMFS staff and other qualified persons aboard groundfish and halibut vessels and at groundfish plants.

5.5.5.1 Impacts on Industry

Option 2 would be expected to decrease, marginally, the direct cost of observer coverage to the industry, improve the quality of the data provided by the Observer Program, and improve communications and the working relationships among the industry, observer providers, observers, and Observer Program Office staff. The expected effects are discussed more fully in Section 3.5.

5.5.5.2 Impacts on Observers

Option 2 would benefit observers by increasing NMFS support for observers. However, it is expected to decrease employment opportunities for observers. NMFS believes that about 350 observer deployment day per year will be replaced with deployments by NMFS staff or other qualified persons. This is expected to be about a 1 percent reduction in the number of deployment days for observers. Based on an estimate of the average observer salary per day of in 2001, this would result in about a $50,000 aggregate decrease in income to observers from employment in the groundfish fishery. Some of this loss could be offset by increased employment and income from other sources, including other observer programs. The expected effects are discussed more fully in Section 3.5.

5.5.5.3 Impacts on Observer Provider Companies

Option 2 would benefit observer providers by improving communications and the working relationships among the industry, observer providers, observers, and Observer Program Office staff. However, as noted above, Option 2 would be expected to decrease the number of observer deployment days provided annually by observer providers by about 350. This is about 1 percent of the annual observer deployment days in recent years. Based on an estimate of the average revenue received by observer providers per observer deployment day in 2001 net of reimbursements for travel costs, this would result in about a $100,000 decrease in annual gross revenue for the observer providers as a group. The expected effects are discussed more fully in Section

3.5.

5.5.5.4. Impacts on NMFS and the Nation

By allowing a more effective use of NMFS staff and other qualified persons with respect to meeting the mission of the Observer Program, Option 2 would be expected to increase the quality of the data provided by the Observer Program. This would result in more informed decisions and, therefore, improvements concerning the conservation and management of BSAI and GOA groundfish and other marine assets. The data quality effects of Option 2 cannot be quantified. The same is true of the potential benefits from improved conservation and management.

The cost to NMFS of deploying staff and other qualified persons for 500 days would be approximately $75,000 for transportation, per diem, and overtime. The cost of salaries and benefits (about $200,000) is not included because in the absence of these deployments, these individuals would be assigned to other tasks. NMFS believes that these deployments would be a very effective use of staff resources.

5.6 Cost - Benefit Analysis

The available data do not permit a quantitative cost and benefit analysis. However, the principally qualitative analysis of the expected impacts of Alternative 2 and 3 and Options 1 and 2 suggests that either alternative to the status quo (i.e., Alternative 1) and both options would provide net benefits to the Nation. The same can be inferred from the fact that, among the industry, observer provider, observer, and NMFS representatives at the January 2002 meeting of the Observer Advisory Committee, no one suggested that Alternative 1 was as good as or better than Alternatives 2 or 3, and there was no opposition overall to Options 1 and 2. However, concerns were raised about some of the elements of Options 1 and 2.

Table 5.1 Numbers of groundfish operations by type and observer coverage requirement.

Vessel Type	Observer Coverage Category	Gear	Number	Year
Motherships	100%	N/A	3	2000
Catcher/processors	100%	Longline Pot Trawl (non-AFA) Trawl (AFA)	43 9 24 16	2000
Catcher vessels delivering to shoreside processors	> 124 (except for pot): 100%	H&L groundfish Trawl (non-AFA) Trawl (AFA)	1 2 28	2000
	60-124 and pot: 30% (≥ 60 except for pot)	H&L Pot Trawl (non-AFA) Trawl (AFA)	125 152 50 62	2000
Shoreside processors:	100%	N/A	18	1999
	30%	N/A	9	1999

Notes: Vessels: generally, 100% coverage is required for vessels >124 ft and 30% coverage is required for vessels from 60 to 124 ft Shoreside processors: 100% coverage is required for processors that process >= 1,000 mt/month of groundfish and 30% coverage is required for processors that process >= 500 mt and < 1,000 mt/month of groundfish. Hook and line (H&L) includes longline, jig and troll gear

Table 5.2 Numbers of vessels that had halibut IFQ landings and numbers of such vessels that did not also participate in groundfish fisheries, by year and length class, 1995-2000.

	Number of vessels with halibut IFQ landings	Number of those vessels without groundfish landings
Year/length class		
1995		
<60	1863	846
60-124	193	14
>124	4	-
Total	2060	860
1996		
<60	1781	826
60-124	177	11
>124	4	-
Total	1962	837
1997		
<60	1757	750
60-124	162	10
>124	6	-
Total	1925	760
1998		
<60	1442	566
60-124	152	9
>124	5	1
Total	1599	576
1999		
<60	1466	491
60-124	141	5
>124	7	2
Total	1614	498
2000		
<60	1485	488
60-124	140	5
>124	18	1
Total	1643	494

Source: Blend estimates, fish tickets, NMFS observer-program data, RAM catch records, Federal and Alaska state vessel-registration files. National Marine Fisheries Service, P.O. Box 15700, Seattle, WA 98115-0070.

6.0 Initial Regulatory Flexibility Act Analysis

The major goals of the Regulatory Flexibility Act (RFA) are: (1) to increase agency awareness and understanding of the impact of their regulations on small business, (2) to require that agencies communicate and explain their findings to the public, and (3) to encourage agencies to use flexibility and to provide regulatory relief to small entities. The RFA emphasizes predicting impacts on small regulated entities and on the consideration of alternatives that may minimize the impacts while still achieving the stated objective of the action.

Currently, insufficient quantitative economic information exists on the fishery under review to determine the economic significance of this action. In the absence of such quantitative social and economic data, a qualitative-based IRFAA is conducted below to comply with the RFA.

6.1 A description of the reasons why action by the agency is being considered

The regulations that specify the required observer coverage levels and that establish the infrastructure for the collection of observer data are set to expire on December 31, 2002. The purpose of the actions being considered is to extend and improve the Observer Program beyond 2002. A more complete description of the purpose and need for the actions contained in Alternatives 2 and 3 and Options 1 and 2 is in Sections 1.2 and 3 of the draft EA/RIR/IRFAA.

6.2 A succinct statement of the objectives of, and the legal basis for, the proposed rule

The objectives of the proposed actions are as follows:

1. Extend the regulations that implemented the Observer Program in order to maintain the Observer Program as a critical source of information for the effective conservation and management of groundfish, other living marine resources, and their habitat.

2. Strengthen the regulations governing the relationships between NMFS and both the observer providers and observers to ensure sufficient management controls in order to increase the quality of the data provided by the Observer Program.

3. Authorize NMFS to place NMFS staff and other qualified persons on fishing vessels and at processing plants, in order to allow a more effective use of NMFS staff and other qualified persons with respect to meeting the mission of the Observer Program in order to increase the quality of the data provided by the Observer Program.

The actions included in Alternatives 2 or 3 and Options 1 and 2 would be taken under the statutory authority of the Magnuson-Stevens Act.

6.3 A description of and estimate of the number of small entities to which the proposed rule will apply

For the proposed actions, the regulated small entities would include the owners or operators of groundfish fishing vessels and processing facilities which have observer coverage requirements, the CDQ groups, and observer providers. With Option 2, the regulated small entities would be extended to include the owners or

operators of groundfish fishing vessels less than 60 ft LOA and all halibut fishing vessels. Brief descriptions of these entities and references to detailed descriptions of these entities are included in Appendix B.

The information necessary to determine if a vessel is independently owned and operated and had gross earnings of less than $3 million, is not available. However, by using estimates of Alaska groundfish revenue by vessel, it is possible to identify vessels that clearly are not small entities. In 2000, 263 catcher vessels and 86 catcher/processor vessels, respectively, used groundfish observers. Based only on estimates of Alaska groundfish revenue, it was determined that 3 of the catcher vessels and 60 of the catcher/processors were large entities. Therefore, up to 260 of the catcher vessels and 26 of the catcher/processors that were required to carry groundfish observers may be small entities. However, with more complete revenue and ownership information, some of those 286 fishing vessels would not qualify as small entities. Information on the number of vessels with observers in 1999 and 2000 is summarized in Table 3.1, Section 3.3. Estimates of the numbers of fishing vessels that are not small entities are in Table 6.1. Groundfish fishing vessels less than 60 ft LOA are not required to carry observers; therefore, they are not included in the estimate of 286 fishing vessels.

With Option 2, the owners or operators of groundfish fishing vessels less than 60 ft LOA and all halibut fishing vessels would also be regulated. In 2000, there were 1,140 groundfish vessels less than 60 ft LOA and 494 halibut fishing vessels that were not part of the groundfish fleet. Most of these halibut vessels and additional groundfish vessels would be small entities. Therefore, for Option 2, up to 1,920 fishing vessels would be regulated small entities.

All of the motherships were assumed to be large entities. Information that would allow the categorization of shoreside processors as large and small is not as readily available, partly because of the very complicated network of relationships among firms. However, it is estimated that 5 processing plants are small entities. This estimate is based on information from phone calls to selected plants, data from State of Alaska Department of Employment reports on employment in large Alaska business firms, and information from NMFS staff familiar with the industry.

All 6 CDQ groups are non-profits and are therefore small by definition. Most of the 5 current observer providers are thought to be small entities. Therefore, for the purposes of Alternatives 2 and 3 and Option 1 there could be up to about 300 small regulated entities. For Option 2, there could be up to about 1,900 small regulated entities.

6.4 A description of the projected reporting, record keeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for preparation of the report or record:

Alternatives 2 and 3 contain no reporting, record keeping or other compliance requirements that are not contained in the current regulations, that this action would extend.

Option 1 includes additional reporting requirements for observer providers and observers. For example, the following change would be made in one observer provider reporting requirement:

> Reports of observer harassment, concerns about vessel or processor safety, observer illness and injury, and observer performance, standards of behavior, and conflict of interest problems, must be

submitted within 24 hours after the observer provider becomes aware of the problem.

The observer provider staff who currently report observer harassment, concerns about vessel or processor safety, and observer performance problems would have the additional responsibility to report observer illness and injury, concerns and standards of behavior, and conflict of interest problems. Observers would be required to report if they had been convicted of a felony or crime of dishonesty when applying to become an observer However, observers are individuals, not small entities, and therefore no covered under RFA.

6.5 An identification, to the extent practicable, of all relevant Federal rules that may duplicate, overlap or conflict with the proposed rule:

This analysis did not reveal any federal rules that duplicate, overlap or conflict with the proposed action.

6.6 A description of any significant alternatives to the proposed rule that accomplish the stated objectives of the Magnuson-Stevens Act and any other applicable statutes and that would minimize any significant economic impact of the proposed rule on small entities:

For assessments of each alternative and option, please refer above to Section 3 of the draft EA/RIR/IRFAA. Alternatives 2 and 3 would maintain the use of a mix of performance and design standards for all entities. Option 1 for Alternatives 2 and 3 extends the use of performance standards and in one case replaces a design standard with a performance standard. Allowing exemptions for small entities from this proposed action, beyond efforts to minimize impacts as described below, would not be appropriate, because the objective to assure uninterrupted observer coverage requirements beyond 2002, could not be achieved if small entities were exempted.

However, this action does include measures that will minimize the significant economic impacts of observer coverage requirements on at least some small entities. Vessels less than 60 ft LOA are not required to carry an observer while fishing for groundfish. Similarly, vessels between 60 ft and 124 ft LOA have lower coverage levels than vessels greater than 124 ft LOA, and shoreside processors that process lower levels of groundfish have lower observer coverage requirements. All pot vessels over 60 ft are required to have 30% coverage. The lower requirement for pot vessels was established in recognition of low bycatch rates, but benefits are realized by small entities in the pot fishery, as well. These measures effectively mitigate the economic impacts on some small entities without adversely affecting implementation of the conservation and management responsibilities imposed by the FMPs and the Magnuson-Stevens Act.

6.7 Conclusion

The direct observer costs relative to the groundfish ex-vessel revenues of small entity vessels are higher than the direct observer costs relative to the groundfish product revenue of at-sea and shoreside processors, which are dominated by large entities (Section 3.2, Table 3.2). For example, on average in 2000, the direct cost of observer coverage as a percent of groundfish ex-vessel revenue was as follows for catcher vessel classes consisting mainly of small entities: (1) longliners 60 - 124 ft, 1.3%; (2) pot vessels 60 - 124 ft, 2.9%; and (3) trawlers 60 - 124 ft, 1.2%. In comparison, on average in 2000, the direct cost of observer coverage as a percent of groundfish product revenue was as follows for processor classes dominated by large entities: (1) fillet factory trawlers, 0.6%; (2) H&G factory trawlers > 124 ft, 1.3%; (3) surimi factory trawlers, 0.5%; (4) motherships, 0.5%; and (5) shoreside plants, 0.3%. In addition, within a vessel class and fishery, smaller

vessels will have higher observer costs relative to their groundfish ex-vessel revenues, to the extent that revenue per fishing day is correlated with vessel size.

Although the average cost of observer coverage probably would be insignificant for some fishing vessels, there would clearly be a significant impact on other vessels because of the range of direct observer costs relative to ex-vessel revenue within each class. For example, in 2000, the maximum direct cost of observer coverage, as a percent of groundfish ex-vessel revenue, was as follows for catcher vessel classes consisting mainly of small entities: (1) longliners 60 - 124 ft, 3.7%; (2) pot vessels 60 - 124 ft, 16.4%; and (3) trawlers 60 - 124 ft, 4.4%.

The annual direct costs borne by industry to meet observer coverage requirements under Alternatives 2 and 3 would be almost $13 million. However, the widespread industry support for extending the Observer Program beyond 2002 suggests that the costs to the industry are less than the benefits received from the Observer Program. The widespread support for Options 1 and 2 also suggests that their adverse effects on small entities would be expected to be less than their beneficial effects.

Table 6.1 Number of vessels with groundfish ex-vessel or product revenue greater than $3 million by area, catcher type and gear, 1996-2000.

	Gulf of Alaska			Bering Sea and Aleutian			All Alaska		
	Catcher Vessels	Catcher process	Total	Catcher Vessels	Catcher process	Total	Catcher Vessels	Catcher process	Total
1996									
All gear	1	36	37	3	67	70	3	67	70
H & L	0	7	7	0	14	14	0	14	14
Trawl	1	29	30	3	54	57	3	54	57
1997									
All gear	3	25	28	3	66	69	3	66	69
H & L	0	6	6	0	16	16	0	16	16
Pot	0	0	0	0	2	2	0	2	2
Trawl	3	19	22	3	50	53	3	50	53
1998									
All gear	0	29	29	0	68	68	0	68	68
H & L	0	8	8	0	21	21	0	21	21
Trawl	0	21	21	0	46	46	0	46	46
Oth. & unk.	0	0	0	0	2	2	0	2	2
1999									
All gear	0	33	33	0	63	63	0	63	63
H & L	0	18	18	0	27	27	0	27	27
Pot	0	1	1	0	4	4	0	4	4
Trawl	0	14	14	0	36	36	0	36	36
Oth. & unk.	0	0	0	0	1	1	0	1	1
2000									
All gear	0	28	28	3	60	63	3	60	63
H & L	0	13	13	0	27	27	0	27	27
Pot	0	0	0	0	1	1	0	1	1
Trawl	0	15	15	3	34	37	3	34	37

Note: Includes only vessels that fished part of Federal TACs.

Source: Fishtickets, weekly processor reports, NMFS permits, commercial operators annual reports. National Marine Fisheries Service, P.O. Box 15700, Seattle, WA 98115-0070.

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APPENDIX A

The Development of the North Pacific Groundfish Observer Program, 1989-2001 and the Use of Information Provided by the Program

Groundfish fisheries in U.S. federal waters of the North Pacific ocean are managed under a set of quotas for groundfish species and for several other species which the groundfish fishery is prohibited from retaining. Quotas are established annually based on stock assessments generate principally by NMFS and on recommendations from the North Pacific Fishery Management Council. The Alaska Region of the NMFS is responsible for monitoring the progress of fisheries toward attainment of those quotas, and for closing the fisheries when quotas are reached. Stock assessments, Quota monitoring, and management requires collection of data from the fishery to account for all groundfish and prohibited species catch, including the portion of the catch which is discarded.

Observer requirements have been in place since the mid-1970s, when the MSA was implemented and it became necessary for NMFS to monitor foreign groundfish fisheries in the EEZ. By 1990 direct foreign participation in these fisheries had ended and the Observer Program infrastructure was changed so that observer coverage could be provided aboard domestic vessels and at processing plants receiving deliveries from domestic vessels participating in these fisheries.

Action by the Council was required to allow development and approval of this domestic Observer Program in 1989. Implementation occurred through Amendment 18 to the GOA FMP and Amendment 13 to the BSAI FMP (54 FR 50386, December 6, 1989). An Observer Plan to implement the program was prepared by the Secretary in consultation with the Council and implemented by NOAA (55 FR 4839, February 12, 1990). The Observer Plan established observer coverage requirements which have remained generally unchanged through 2001. These coverage requirements, which vary with the size of the fishing vessel or quantity of fish processed by floating or on-shore processors, are described later in this appendix.

NMFS' ability to assure that quality observer data is collected, and the integrity of that data is of the highest concern to the agency, since it is a cornerstone of the groundfish fisheries' management. However, NMFS' ability to maintain data quality assurance is constrained by several features of the current program structure. In particular, allowing fishing companies to negotiate directly with observer companies for observer services creates a serious potential for conflict of interest and reduces NMFS management controls over the observer companies performance. As observers assume increased responsibilities for monitoring individual vessel performance, incentives for industry to use this procurement system to their advantage increase. Observer providers are under constant pressure to provide observers who meet their clients' needs rather than focus on data quality assurance. Competitive pressure to reduce coverage costs to the industry keeps observer salaries low, discouraging the best observers from renewing their contracts. Furthermore, instability in the fishing and contracting industries has created situations where observers have not been paid for work performed. These circumstances have undermined observer morale, increased turnover in the observer work force and adversely influenced data quality.

Although NMFS certifies observer providers (contractors) based on an application process designed to gauge how well a company can fulfill the standards and responsibilities set out in regulations for observer providers, NMFS has not been able to effectively monitor private company activities and operations to assess actual performance. As a result, companies that actually may not be meeting standards envisioned for the Observer Program are allowed to continue business without significant risk of being decertified by NMFS.

Alternatives for a truly effective assessment likely are not possible without more direct oversight of observer companies by NMFS or a third party organization providing observer services.

To address these concerns, the North Pacific Fishery Management Council (Council) directed NMFS to develop a new program (the Research Plan) incorporating a concept which would require all fishery participants to pay a fee based on the revenue from their catch. Collection of this fee was authorized by an amendment to the Magnuson-Stevens Fishery Conservation and Management Act. Under this program NMFS would collect the fee and would contract directly with observer companies, thus removing the direct link between the fishing industry and the observer contracting industry. The Council adopted the Research Plan in 1992 and NMFS approved and implemented this program in 1994. During 1995, over $ 5.5 million was collected to capitalize the North Pacific Fisheries Observer Fund.

Over the period that the Research Plan was developed and implemented, industry concerns about the program arose. These issues included:

- Redistribution of costs for observer services that resulted from the collection of fees based on a percentage of ex-vessel revenue;
- Industry concerns about unlimited observer costs in the event observer coverage beyond that funded by fees continued to be required of some vessels participating in specified management programs;
- The amount of observer coverage that could be funded under the Research Plan fee collection program was limited and could constrain the development of programs under consideration by the Council that would require increased observer coverage;
- Increased costs of observer coverage due to the contractual arrangements between NMFS and observer companies that would fall under the Services Contract Act. Under this act, a company under contract to the Federal Government must pay a wage at least comparable to the union wage, or if there is no established union wage for a particular type of work, the contractor must pay a wage at least as high as the wage standard established by the Department of Labor for that type of work.

After consideration of these concerns, the Council voted to repeal the Research Plan at its December 1995 meeting and refund the fees collected from the 1995 fisheries. At the same meeting, the Council directed NMFS to develop a new plan to address the data integrity issues the Research Plan was intended to address. Under the new concept endorsed by the Council, fishing operations required to obtain observers would continue to pay coverage costs, but payment would be made to a third party. The third party would enter into subcontracts with observer companies and would direct each vessel and processor to a specified observer provider for services. Payments received by the third party would be used to pay observer contractors for providing observer services and to cover administrative costs.

At its April 1996 meeting the Council adopted an interim groundfish Observer Program that superseded the Research Plan and authorized mandatory groundfish observer coverage requirements through 1997. The interim groundfish Observer Program extended 1996 groundfish observer coverage requirements as well as vessel and processor responsibilities relating to the Observer Program through December 31, 1997.

During 1997, observers organized to bargain for better compensation and working conditions. Currently, the Alaska Fishermen's Union (AFU) has contracts with most of the observer providers.

Also during 1997, NMFS began to develop with Pacific States Marine Fisheries Commission (PSMFC) the concept of a joint partnership agreement (JPA) under which PSMFC would provide the third party procurement functions envisioned by the Council. At its June 1997 meeting, the Council endorsed the

continued development of a JPA with the goal of taking final action on the third party program early in 1998 so that a new program could be implemented by 1999. The JPA arrangement could not be developed and implemented prior to 1998, and the Council voted to extend the interim Observer Program though 1998.

At its December 1997 meeting, the Council recommended that NMFS and PSMFC continue to develop a joint partnership agreement (JPA) that would authorize PSMFC to provide observer procurement services. The Council also requested NMFS to work with the Council's Observer Advisory Committee to again develop a fee collection program. The Council anticipated that the JPA would be effective by 1999 and that a fee collection program would be implemented as soon as possible thereafter.

An unresolvable legal issue was identified by PSMFC that forestalled efforts to proceed with the JPA. Under the JPA, PSMFC would have been responsible for providing observer services to the industry and for the deployment of observers onboard vessels and at shoreside processing facilities. NMFS also envisioned that PSMFC would have ensured that observers be available to NMFS through the completion of the debriefing process. An exposure to the risk of a lawsuit through their role as a third party to observer procurement arrangements was determined by PSMFC to be too high. Furthermore, NMFS could not sufficiently indemnify PSMFC against legal challenge because (1) no statutory authority for such indemnification exists and (2) the Anti-Deficiency Act precludes open-ended indemnification. Regulations developed to implement the JPA were thought to be able to deflect potential lawsuits away from PSMFC to NMFS. Nonetheless, such deflection could not sufficiently reduce the potential for lawsuit in a manner that would allow PSMFC to go forward with the JPA as endorsed by the Council. With the demise of the JPA as a viable alternative to the Interim Observer Program, the OAC and the Council, as well as NMFS, continued to advocate pursuit of an appropriate program structure that would address the issues that the Research Plan and the JPA were intended to resolve; and the Interim Program was extended in 1998 with an expiration date of December 31, 2000.

In the fall of 1998 Congress passed the American Fisheries Act (AFA) which provided the opportunity for the formation of fish harvesting cooperatives in the BSAI fishery and limited participation in this fishery, effective January 1, 1999. Council and NMFS attention during most of 1999 and the first part of 2000 was focused on implementing the AFA. Additionally, NMFS was involved both in preparing a programmatic supplemental environmental impact statement (PSEIS) for the BSAI and GOA groundfish fisheries and in litigation regarding Steller sea lion conservation issues as related to the pollock fishery. These issues absorbed significant Council and agency resources during 1999 and 2000 and superceded the development of a restructured Observer Program. At their October 1999 meeting the Council voted to recall the OAC, which had not met in over a year, and installed a new chairman and membership. The Council charged the committee with reviewing the Observer Program in its entirety and developing appropriate alternatives to the current program to meet the needs and goals of the Council and NMFS, including those cited for the development of the Research Plan an JPA, as well as to meet new challenges that have arisen.

In 2000, the Interim Program was once again extended for two years with an expiration date of December 31, 2002. This was approved with the expectation that a restructured program would be developed and implemented by that date. The anticipated restructured program was expected to address the concerns set forth by the administrative record which provided the justification and impetus for the development of the Research Plan and the Joint Partnership Agreement, as well as address the concerns that brought about the demise of the Research Plan and JPA initiatives. NMFS has been working with the OAC since March 2000 to develop a program structure as an alternative to the Research Plan, JPA, and the current Interim Program. In assessing the appropriate course of action in light of the inability to effectively implement either the

Research Plan and JPA, it was determined that a step-wise approach to program restructuring would be most effective. This approach would de-link the more difficult and controversial issues from the more straightforward needs, such as administrative improvements included in this proposed action, and would increase the likelihood that workable components could be developed, agreed upon by affected parties, and implemented in a timely manner. The more difficult major issues, such as developing an alternate funding mechanism and revising observer coverage levels and placement, would be treated individually as appropriate.

1.1.1 Description of the Interim Observer Program

The Observer Program is managed by Observer Program staff at the NMFS Alaska Fishery Science Center (AFSC) in Seattle and is charged with the responsibility to provide information essential for the management of sustainable fisheries, associated protected resources and marine habitat in the North Pacific. Program responsibilities include program administration; observer training and certification; observer provider certification and performance oversight; observer gear supply; observer briefing; observer in-season advising; observer debriefing and evaluation; and data management; which includes quality control and providing accessibility to users. The Observer Program also is responsible for participating in development and implementation of new fishery management programs that affect observers or observer coverage and for conducting research necessary to support the mission of the Observer Program.

Observers are recruited by any of the five active private observer provider companies currently certified by NMFS and are trained either at the AFSC or at the Observer Training Center, University of Alaska, Anchorage. Level 1 observers are certified by NMFS upon successful completion of a three-week training program. Qualification as a Level 2 observer, required for CDQ and AFA fisheries, includes meeting specific experience levels and the successful completion of an additional five day training. Vessel and plant owners required to obtain observers may contact the NMFS-certified provider company of their choice and enter into private negotiations for observer services. Observer costs accrue only to those vessels and plants required to obtain observers. Observers are re-certified after each deployment pending an assessment by NMFS that the observer satisfactorily performed required duties.

Primary responsibilities of observers include: (1) collection of data on catch quantity and composition for in-season management and estimation of fishing mortality; (2) collection of biological data and samples for size and age composition determination and other scientific studies associated with stock assessment and ecosystem research; and (3) documentation of interactions between fishing operations and marine mammals and birds. Observer data may be used to evaluate compliance with individual vessel performance programs or catch accounting (e.g. Vessel Incentive Program and CDQ and AFA programs) and is the basis for NMFS's estimates of prohibited species bycatch. The deployment cycle of an observer includes: recruitment, hiring, training, briefing, deployment, data collection/entry, in-season advising, mid-cruise review, and debriefing. Criteria for becoming an observer include physical, education, experience standards designed to deploy observers who will uphold the high standards that NMFS sets for data collection

1.1.2 Use of Observer Data

1.1.2.1 In-season management[2]

[2]Section 1.2 is largely a quotation of text from NMFS, 2001b, with minor revisions.

TACs, allocations, and closures

Annual groundfish total allowable catch (TAC) amounts and prohibited species catch (PSC) limits are either established in regulations or through the annual groundfish specification process.[3] These area-specific TACs and PSC limits may be further apportioned by harvesting or processing sector, season, gear, or vessel size class. In addition, pollock, Pacific cod and Atka mackerel also have seasonal harvest limits inside the Sea Lion Conservation Area (SCA) . Tables 1 and 2 summarize the gear, sector, seasonal allocations and critical habitat area catch limits in effect for pollock, Pacific cod, and Atka mackerel in 2001, based on the emergency interim rule (EIR) published on January 22, 2001.

Amounts Available for Directed Fishing: NMFS initially estimates how much of each groundfish species will be caught as incidental catch in other directed groundfish fisheries throughout the year. The amount available as a directed fishing allowance is determined by subtracting the estimated incidental catch needs from the total amount available for the species or species group. For some species, including some rockfish species, NMFS usually determines that the entire TAC will be needed as incidental catch and no directed fishery will be allowed. These species are placed on bycatch status at the beginning of the year through a notice in the *Federal Register*. For other species, including pollock, Pacific cod, and Atka mackerel, sufficient TAC exists to authorize directed fisheries in most management areas.[4]

NMFS must conduct real-time monitoring of the catch of groundfish to predict when a catch limit will be reached and close the directed fishery before the directed fishing allowance is exceeded. Closure notices must be published in the *Federal Register*, which requires NMFS to decide on a closure date from one to five days before the closure must be effective. The Office of the Federal Register is closed on weekends and Federal holidays. The requirement to publish closures in the *Federal Register* limits how quickly NMFS can close a fishery. In-season closure notices are not required for individual quota programs such as the halibut and sablefish Individual Fishing Quota (IFQ) Program or the Community Development Quota (CDQ) fisheries, because IFQ holders and CDQ holders are responsible for maintaining catch within assigned quota limits.

Types of closures: In general there are three types of in-season closures. The first is a target species quota closure issued when a TAC, or apportionment of a TAC, is harvested. The second is a prohibited species closure in which vessels participating in a fishery approach a prohibited species bycatch allowance before harvesting all of the groundfish species available to them. The third is closure of a target species fishery when the catch of an incidentally caught species approaches its overfishing limit.

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[3]The annual specifications process refers generally to the process of the Council developing recommendations for annual groundfish quotas and allocations of prohibited species catch limits at its December meeting, and NMFS implementing these recommendations through notice in the *Federal Register*.

[4] Exceptions in 2001 include: directed fishing is prohibited for Atka mackerel in the GOA, and pollock in Bogoslof, the Aleutian Islands, and area 620 of the Central GOA in the A and B seasons.

Table 1. Regulatory Allocations of Total Allowable Catch Specifications for Pollock, Pacific Cod, and Atka Mackerel in 2001 (based on 1/21/01 EIR) - Bering Sea and Aleutian Islands Area

Species[a]	Gear	Season	Other Allocations and Reserves
Pollock	Use of nonpelagic trawl gear prohibited	Seasons %TAC A/B season 1/20 to 6/10 40% C/D season 6/10 - 11/1 60% Inside SCA catch limits • A season -- 1/20 to 4/1 Same • B season -- 4/1 to 6/10 amount • C season -- 6/10 to 8/20 as in • D season -- 8/20 to 11/1 2000	• CDQ component 10% • Incidental bycatch of the remaining TAC 4% Remaining TAC divided • Inshore component 50% • Mothership component 10% • Catcher/processor component 40%
Pacific cod	Jig 2% Hook-and-line/pot 51% Trawl 47%	Trawl seasons • A season – 1/20 - 6/10 60% • B season – 6/10-11/1 40% Fixed gear seasons (don't apply to jig and <60' LOA) • A season – 1/1 - 6/10 60% • B season – 6/10-12/31 40%	• CDQ 7.5% of TAC Hook-and-line/pot allocation split HAL c/p (80%) HAL c/v (0.3%) Pot c/v (18.3%) c/v <60' (1.4%) Trawl allocation split c/p (50%) c/v (50%)
Atka mackerel	• Jig gear — up to 2% of Eastern AI and BS (541) TAC	• Season dates Trawl A season—1/20 to 4/15 Trawl B season—9/1 to 11/1	CDQ 7.5% of TAC • Trawl allocation split A season 50% B season 50% • Catch inside SSL CH limited to following % of TAC CH Limit by Area Year 542 (CAI) 543 (WAI) 2001 46% 48% 2002+ 40% 40%

Table 2 Allocations of Total Allowable Catch Specifications for Pollock, Pacific Cod, and Atka Mackerel in 2001 (based on 1/21/01 EIR) - Gulf of Alaska

Species	Gear	Season	Other Allocations and Reserves
Pollock	None specified	• Western and central GOA: 1/20 to 3/1—first allowance 30% 3/15 to 5/31—second allowance 15% 8/20 to 9/15—third allowance 30% 10/1 to 11/1—fourth allowance 25% • Eastern GOA - 1/20 to 12/31	Inshore component 100% Offshore (bycatch)
Pacific cod	Trawl gear Fixed gear	• A season – 1/20 - 6/10 • B season – 6/10-11/1 • A season – 1/1 - 6/10 • B season – 6/10-12/31	Inshore component 90% Offshore component 10% A season (60%) B season (40%)

Under the current inseason management system, a species is either open, or on bycatch or prohibited status at any given point in time. When a species is open, vessels are allowed to target and retain it with no restrictions on the amount harvested. Once a particular species TAC or PSC bycatch allowance specified for a fishery has been reached, NMFS closes the directed fishery for that species and it goes on bycatch status. Vessel operators are then limited in the amount of the species closed to directed fishing that they may retain. If the harvest of a given species goes beyond the TAC and approaches the acceptable biological catch (ABC), NMFS will put the fishery on prohibited species status, which prohibits the retention of any fish of that species for the remainder of the year.

Information Used for In-Season Quota Management

NMFS estimates catch and bycatch in the groundfish fisheries using information principally from the Observer Program and weekly production reports (WPR) or the electronic shoreside logbook which are used by some shoreside processors instead of WPRs. Those estimates are used to determine when to close a directed fishery to prevent a quota from being exceeded. .Brief descriptions of the observer data and WPR data are followed by a description of how these two types of data are used to estimate groundfish catch and bycatch and the bycatch of prohibited species for the at-sea and shoreside processor sectors. The prohibited species include Pacific halibut, salmon, herring, and crabs.

Weekly Production Report Data: All processors are required to submit a WPR to NMFS by the Tuesday following the end of the weekly reporting period at midnight Saturday, unless the processor is submitting an electronic logbook. The WPR provides information about the species, product form, and product weight of all processed product. For shoreside processors, the WPR also includes landed weight for groundfish species. WPRs report catch by NMFS reporting area (3-digit area) and whether catch occurred inside the C. opilio bycatch limitation zone (COBLZ) or the Red King Crab Savings Area (RKCSA). However, WPRs currently do not report the location of catch inside the SCA. For all processors, the WPR also includes estimates of at-sea discards. But the quality of those discard estimates is thought to be quite poor.

The Shoreside Processor Electronic Logbook Report (SPELR) system can be used by shoreside processors instead of the WPR. The SPELR contains reported catch locations, species and amounts by State of Alaska statistical area.

Observer Program Data: Observers provide NMFS with information on a haul or set basis that includes the locations of where gear was set and retrieved (latitude and longitude to the nearest minute) and an estimate of the total catch of each species. NMFS also makes these data available to vessel owners. If a vessel has the appropriate computer and communications equipment, in-season observer data is transmitted to NMFS once a day and is available to authorized persons on the Observer Program's website within 30 minutes of receipt by NMFS. Validated observer data is available to the Alaska Regional Office by the day following receipt by the Observer Program (the Regional Office runs observer data extraction programs one time per day, at night, to minimize the impact of the resource-intensive computer programs on other regional computer systems). Delays of up to several days to a week can occur in sending observer data from a vessel if the computer is not working, if communication problems occur, or if the observer's workload prevents data entry duties. However, data is not finalized until debriefing, which may occur up to three months after data is collected. Errors found in debriefing would be corrected at this time.

If the vessel or shoreside processor does not have a computer or reliable communications, observer data is faxed to NMFS. Data from approximately 1/4 of the hauls and sets sampled by observers is faxed in, the

remaining data for 3/4 of the hauls and sets are transmitted electronically. Faxes are sent by observers at the first location with a fax machine available, which may be up to three weeks after the catch occurs. All data from catcher vessels delivering to shoreside plants currently are faxed to NMFS. With faxed data, NMFS staff must enter the data before it can be made available to inseason managers.

At-Sea Processor Sector

The catcher-processor and mothership fleet has a high level of observer coverage. Observers on processor vessels estimate total catch weight and collect species composition samples for a high percentage of hauls or sets. In addition to observer data, each processor submits weekly production reports which report the weights of processed products and weights of discards. Product weights are converted to equivalent round weights using product recovery rates which are published in federal regulations. The blend process is used to select which report (observer or WPR) will be used as the official accounting of catch for the processor for a particular week.

Observed catcher/processors or motherships: Observers submit estimates of total catch for each haul or set made and estimates of species composition for each sampled haul or set. Information about species composition is used to estimate the weight or numbers of each species in the sampled haul or set and also can be extrapolated to the unsampled hauls or sets on the same vessel. Processors also submit WPRs providing estimates of retained catch and discards by species. NMFS compares these estimates through the blend and selects estimates of catch by species from either the observer data or the WPR to account for catch against quotas. For some fisheries (CDQ, AFA) NMFS uses only observer data and does not use the blend to account for catch. Observers on processor vessels report groundfish species composition, total catch, and estimates of retention and discards on a weekly basis for each separate reporting area and gear type.

Unobserved catcher/processors: No observer data is available when an observer is not on a catcher/processor. In this case, WPR data and product recovery rates are used to estimate groundfish catch by species.

Catcher vessels delivering unsorted catch to motherships: Catch data is obtained from the mothership using the method described above for "observed catcher/processors and motherships." All motherships taking deliveries of unsorted catch have at least one observer onboard at all times and, if the mothership is participating in the AFA or CDQ pollock fisheries, it is required to have two observers and all deliveries (hauls) are sampled for species composition.

Processor vessels in the CDQ fishery are required to have certified bins and carry two observers, so that the percentage of hauls with weight estimated by an observer is near 100 percent. Some of these vessels carry two observers during the 'B' season open access fishery in the Bering Sea and Aleutian Islands. Because of the confidence the NMFS has in observer-estimated weights using certified bins, these vessels are excluded from the blend process described below.

The Blend Process Total groundfish catch for all species combined is computed each week for each processor vessel from the weekly production report and from the observer report. If either report is missing, the report present is selected as the source of data for that processor during that week. If both reports are present, the blend compares the two total catch weights as follows:

- If the WPR and observer total catch weights are within 5 percent, the WPR is selected as the source.

- If the WPR is more than 30 percent higher than the observer total catch (for pollock target fisheries) or more than 20 percent higher (all other targets), the WPR is selected as the source. (Pollock is processed into several products with highly variable recovery rates, including surimi and deep-skin fillets. The wider selection range is needed to ensure that WPR records are not inappropriately selected in cases where a processor achieves high recovery rates.)

- In all other cases, the observer report is selected as the source.

The blend program then returns to the source data (WPR or observer) and copies the detailed records, showing gear type, area and species, to the catch accounting database. Records from WPR are identified in the blend by a Source field value of 'W', observer records are identified by a Source field value of 'O.'

Shoreside Processor Sector

The same method is used to estimate groundfish and prohibited species catch for all catcher vessels delivering to shoreside or floating processors, regardless of whether the vessel carries an observer or not. The processor's report of landed catch weight as reported on the WPR or SPELR is used to account for the total retained catch by vessels delivering to a processor. Landings are typically in round weight, or in a form, such as "bled only," or "headed and gutted," with a high product recovery rate. For fish landed in forms other than round, landed weights are converted to round weight using product recovery rates which are published in federal regulations.

Alaska State law requires all fish purchased to be weighed on a State certified scale. Some fish, landed but not purchased, may not be required to be weighed on a State certified scale, but the processors must still log and report these fish in the federal reporting system. No information is available about the actual accuracy of shoreside landed weights under operational conditions. Observers at shoreside plants collect biological samples, but do not verify the accuracy or completeness of landed weights.

Recordkeeping and reporting regulations require catcher vessel operators to report at-sea discards to the shore plant for inclusion on the shore plant WPR. Because observer data showed that at-sea discards by catcher vessels could be significant and compliance with the industry reporting requirement was found to be poor and difficult to verify, the NMFS now calculates catcher vessel at-sea groundfish discards based on observed discard rates from catcher vessels delivering to shoreside processors.

Observers on shore-delivering catcher vessels collect data on at-sea discards of groundfish. All observer data for a month, gear, and target fishery are combined to compute discard rates for each groundfish species observed to be discarded. The discard rates are expressed as a ratio of the weight of the discarded species to the total retained groundfish weight. The discard rates are multiplied by the retained landings for each shoreside processor to estimate total at-sea discards of groundfish associated with the groundfish landed to the processor.

Total catch for shoreside processors is obtained by adding the landed catch weights reported on shoreside processor weekly production reports to the estimates of at-sea discards which are based on observer data.

Observer Coverage Levels

Observer coverage levels are set by regulation. In general, for license limitation (i.e., non-CDQ and non-

AFA) groundfish fisheries, two levels of coverage are designated, depending on the size of the vessel, or in the case of motherships and shoreside processors, the amount of groundfish received and/or processed in a month. The general requirements are outlined below, thought there are some additional requirements to those mentioned here.

A shoreside processor or mothership that processes more than 1,000 mt or more in round-weight equivalent of groundfish is required to have an observer aboard each day it receives or processes groundfish that month. A shoreside processors or mothership that processes between 500 and 1,000 mt of round weight equivalent of groundfish in a month is required to have an observer aboard at least 30% of the days it receives or processes groundfish.

Catcher/processors or catcher vessels 60 ft (18.3m) LOA and greater, but less than 125 ft (38.1 m) LOA that fish for groundfish in the BSAI or the GOA are required to have an observer aboard for at least 30% of all fishing days in a calendar quarter and for at least one complete fishing trip for each groundfish category it fishes in that same quarter. Catcher/processors or catcher vessels 125 ft (38.1 m) LOA and greater are required to have an observer aboard for 100% of tall fishing days in a calendar quarter. Two exceptions to this are that vessels in the larger size category using pot gear are only required to maintain observer coverage for 30% of their fishing days and there are no observer coverage requirements for catcher vessels delivering unsorted catch to motherships.

With exceptions for CDQ and AFA fisheries, observer coverage levels have remained generally unchanged since they were implemented in 1990 under FMP Amendments 18/13 which established the domestic Observer Program in the North Pacific. Coverage levels were initially established based on an analysis of precision in observer catch estimates and program costs. Since the initial levels were established many changes in groundfish management have occurred, but only in a few instances has the observer coverage levels been re-analyzed in terms of the management objectives. A comprehensive review of coverage needs by fishery would take into account all scientific, management, and compliance needs. The issue of observer coverage requirements is beyond the scope of this analysis, but it is included in one of the fundamental issues that needs to be addressed in overall program restructuring.

APPENDIX B

References to Related NEPA and Fisheries Description Documents
And
A Description of the Fleet, Fishery, and Industry Affected

1. Related NEPA Documents

The original EISs for the BSAI and GOA FMPs were completed in 1981 and 1979, respectively. The TAC setting process was revisited in an SEIS in 1998 (NMFS, 1998). That document analyzed the impacts of groundfish fishing over a range of TAC levels. An EA for the implementation of the original Observer Plan was completed in 1989 (NMFS, 1989). Subsequent EAs were completed for the implementation of the Research Plan (NMFS, 1996a) and Interim Groundfish Observer Program (NMFS, 1996b), as well as for the extension of the interim programs in 1998. This proposed extension of the interim Observer Program is within the scope of the issues analyzed for those actions. Therefore, the analyses prepared for the Interim Groundfish Observer Program is incorporated by reference into this document. These analyses include:

- EA/RIR/FRFA for Research Plan
- EA/RIR/FRFA for Amendment 47 to the Fishery Management Plan for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area and Amendment 47 to the Fishery Management Plan for Groundfish of the Gulf of Alaska and Amendment 6 to the Fishery Management Plan for the Commercial King and Tanner Crab Fisheries In the Bering Sea and Aleutian Islands Area To Implement a North Pacific Groundfish Observer Program to Replace the North Pacific Fisheries Research Plan, NMFS, August 27, 1996.
- RIR/FRFA to Extend the Interim Observer Program Beyond 1998, NMFS, June 4, 1998.
- RIR/FRFA to Extend the Interim Observer Program Beyond 2000, NMFS, November xx, 2000.
- RIR/RFAA to a Proposed Rule to Amend Regulations for Observer At-Sea Electronic Communication Equipment Requirements for Vessels and Shoreside Processors in the North Pacific Groundfish Fisheries, NMFS, January xx, 2002.
- EA/RIR/RFAA for the Total Allowable Catch Specifications for the Year 2002, November, 2001.

In addition to the Observer Program analyses, a draft programmatic SEIS has been prepared and circulated for public review and comments (NMFS, 2001). The analysis evaluates the BSAI and GOA groundfish FMPs in their entirety against policy level alternatives. The programmatic SEIS provides insight as to what environmental effects would result from various fisheries management regimes within an analytical framework. Findings of that analysis could result in FMP amendments that could lead to formal rulemaking and implementation of changes to the current management policy governing the groundfish fisheries off Alaska. The public comment period was from January 25, 2001 through July 25, 2001. Finalization of that document is not expected within the near future.

Additionally, impacts from changes to observer coverage requirements in some sectors of the groundfish fisheries caused by the implementation of the Multi-species Community Development Quota (MS CDQ) have been thoroughly analyzed in the EA/RIR/FRFA for that programs (September 9, 1997) and are incorporated by reference into this document.

On October 21, 1998, the President signed into law the American Fisheries Act (AFA), which imposed major structural changes on the BSAI pollock fishery including: 1) The buyout of nine pollock factory trawlers, 2) major shifts in pollock allocations from the offshore to the inshore and CDQ sectors of the industry, 3) a prohibition on entry of new vessels and processors into the BSAI pollock fishery, 4) authorization of harvester cooperatives in the inshore, mothership, and offshore sectors, and 5) establishment of protections for other fisheries. Formation of fishery cooperatives under the AFA has reduced pressure on vessels participating in coops to race with each other to harvest available pollock quotas in Bering Sea management areas. However, the AFA-mandated shift in pollock allocations from the offshore sector to the less-mobile inshore sector could intensify fishing effort in near shore areas critical to Steller sea lions, in the absence of mitigating measures. The Council has developed proposed management measures to implement the provisions of the AFA, and a draft EIS for these proposed regulations has been prepared (November 2001).

2. Description of the Fisheries Documents

Detailed descriptions of the fisheries may be found in the following reports (all made public during 2001 and all readily available over the Internet at links given in the references):

Alaska Groundfish Fisheries. Draft Programmatic Supplemental Environmental Impact Statement (NMFS, 2001). This report contains detailed fishery descriptions and statistics in Section 2.7, "The Federal Action: Alaska Groundfish Fisheries and their Management", in Section 3.10, "Social and Economic Conditions," and in Appendix I, "Sector and Regional Profiles of the North Pacific Groundfish Fisheries."

"Economic Status of the Groundfish Fisheries off Alaska, 2000" (Hiatt, Felthoven and Terry, 2001) is also known as the "2001 Economic SAFE Report." This document is produced and updated each Fall by the Alaska Fisheries Science Center. The 2001 edition contains 49 historical tables summarizing a wide range of fishery information through the year 2000.

Steller Sea Lion Protection Measures Supplemental Environmental Impact Statement (NMFS, 2001) contains several sections with groundfish fishery descriptions focused on pollock, Pacific cod, and Atka mackerel. Section 2.3 goes through area, species, season and gear allocations using 2001 stock assessment data. Section 3.12.2 provides extensive background on existing social conditions; Appendix C provides information on fishery economics; Appendix D provides background on groundfish markets; and Appendix E documents harvest amounts and location by week throughout one fishing year.

Draft Environmental Impact Statement for the American Fisheries Act Amendments 61/61/13/8 (NMFS 2001) provides a survey of the Bering Sea and Aleutian Islands groundfish fishery paying particular attention to the pollock fishery and the management changes introduced into it following the American Fisheries Act. This is provided in Section 3.3.

1. Description of the Fleet, Fishery, and Industry Affected

The different classes of operations that might be affected by these regulations are described in detail in Section 3.10 (Social and Economic Conditions) of the Alaska Groundfish Fisheries Draft Programmatic Supplemental Environmental Impact Statement (PSEIS). (NMFS, 2001). Sub-section 3.10.2 provides extremely detailed fishing and processing sector profiles. Considerable additional detail is contained in Appendix I of the PSEIS, "Sector and Regional Profiles of the North Pacific Groundfish Fisheries." This section provides brief descriptions of the relevant fleet sectors; readers interested in additional detail are

referred to the PSEIS.

Catcher/Processors

Catcher/processors carry the equipment and personnel they need to process the fish that they themselves catch. In some cases catcher/processors will also process fish harvested for them by catcher vessels and transferred to them at sea. There are many types of catcher/processors. They are distinguished by target species, gear, products, and vessel size.

- *Pollock catcher/processors in the BSAI.* These trawlers are referred to as the "AFA catcher/processors" because of the role played by the American Fisheries Act (AFA) of 1998 in structuring the fishing sector. The AFA recognized pollock trawl catcher/processors as a distinct industry segment, limited access to the fleet, modified the historical allocation of the overall pollock TAC that the fleet had received, and created a legal structure that facilitated the formation of a catcher/processor cooperative.[5] The pollock at-sea processing fleet has two fairly distinct components - the fillet fleet, which concentrates on fillet product, and the surimi fleet, which produces a combination of surimi products and fillets. Both of these sectors also produce pollock roe, mince, and to varying degrees fish meal.
- *Trawl Head And Gut (H&G) catcher/processors*. These factory trawlers do not process more than incidental amount of fillets. Generally they are limited to headed and gutted products or kirimi. In general, they focus their efforts flatfish, Pacific cod, and Atka mackerel. Trawl H&G catcher/processors are generally smaller than AFA catcher/processors and operate for longer periods than the surimi and fillet catcher/processor vessels that focus on pollock. A fishing rotation in this sector might include Atka mackerel and pollock for roe in January; rock sole in February; rock sole, Pacific cod, and flatfish in March; rex sole in April; yellowfin sole and turbot in May; yellowfin sole in June; rockfish in July; and yellowfin sole and some Atka mackerel from August to December. The target fisheries of this sector are usually limited by bycatch regulations or by market constraints and only rarely are able to catch the entire TAC of the target fisheries available to them.
- *Pot catcher/processors*. These vessels have been used primarily in the crab fisheries of the North Pacific, but increasingly are participating in the Pacific cod fisheries. They generally use pot gear, but may also use longline gear. They produce whole or headed and gutted groundfish products, some of which may be frozen in brine rather than blast frozen. Vessels in the pot catcher/processor sector predominantly use pot gear to harvest Bering Sea and GOA groundfish resources. The crab fisheries in the Bering Sea are the primary fisheries for vessels in the sector. Groundfish harvest and production are typically secondary activities. Vessels average about 135 feet LOA and are equipped with deck cranes for moving crab pots. Most pot vessel owners use their pot gear for harvesting groundfish. However, some owners change gear and participate in longline fisheries. Pot catcher/processors over 125 feet are subject to somewhat different observer requirements than other large catcher/processors; these pot vessels are only required to have coverage on 30% of their fishing days as opposed to the 100% coverage required on other vessels over 125 feet.
- *Longline catcher/processor*. These vessels, also known as freezer longliners, use longline gear to harvest groundfish. Most longline catcher/processors are limited to headed and gutted products, and in general are smaller than trawl H&G catcher/processors. The longline catcher/processor sector evolved because regulations applying to this gear type provide more fishing days than are available

[5] There are non-pollock factory trawlers in the BSAI, about 25 'head and gut', or H&G factory trawlers, which target species other than pollock. Those vessels are not covered in this description.

to other gear types. Longline catcher/processor vessels are able to produce relatively high-value products that compensate for the relatively low catch volumes associated with longline gear. These vessels average just over 130 feet LOA. In 1999, there were 40 vessels operating in this sector. These vessels target Pacific cod, with sablefish and certain species of flatfish (especially Greenland turbot) as important secondary target species. Many vessels reported harvesting all four groundfish species groups each year from 1991 through 1999. Most harvesting activity has occurred in the Bering Sea, but longline catcher/processor vessels operate both the BSAI and GOA.

Motherships

Motherships are defined as vessels that process, but do not harvest, fish. The three motherships currently eligible to participate in the BSAI pollock fishery range in length from 305 feet to 688 feet LOA. Motherships contract with a fleet of catcher vessels that deliver raw fish to them. As of June 2000, 20 catcher vessels were permitted to make BSAI pollock deliveries to these motherships. Substantial harvesting and processing power exists in this sector, but is not as great as either the inshore or catcher/processor sectors.

Motherships are dependent on BSAI pollock for most of their income, though small amounts of income are also derived from the Pacific cod and flatfish fisheries in Alaska. In 1999, over 99 percent of the total groundfish delivered to motherships was pollock. About $30 million worth of surimi, $6 million of roe, and $3 million of meal and other products was produced from that fish. These figures exclude any additional income generated from the whiting fishery off the Oregon and Washington coasts in the summer. In 1996, whiting accounted for about 12 percent of the mothership's total revenue. Only one of the three motherships participated in the GOA during 1999, and GOA participation in previous years was also spotty. This is likely due to the Inshore/Offshore restriction that prohibits pollock from being delivered to at-sea processors in the GOA.

Groundfish catcher vessels

Catcher vessels harvest fish, but are not themselves equipped to process it. They will deliver their product at sea to a mothership or catcher/processor, or to an inshore processor. There are a wide variety of catcher vessels, distinguished by product and gear type.

- *AFA-qualified trawl catcher vessels* Vessels harvesting BSAI pollock deliver their catch to shore plants in western Alaska, large floating (mothership) processors, and to the offshore catcher/processor fleet. Referred to as catcher vessels, these vessels comprise a relatively homogenous group, most of which are long-time, consistent participants in a variety of BSAI fisheries, including pollock, Pacific cod, and crab, as well as GOA fisheries for pollock and cod. There are 107 eligible trawl vessels in this sector, and they range from under 60 feet to 193 feet, though most of the vessels fishing BSAI pollock are from 70-130 feet. Ninety AFA catcher vessels are equal to or greater than 60 ft, requiring either 30% or 100% observer coverage. The AFA established, through minimum recent landings criteria, the list of trawl catcher vessels eligible to participate in the BSAI pollock fisheries. There is significant, and recently increasing, ownership of this fleet (about a third) by onshore processing plants.
- *Non-AFA trawl catcher vessel (greater than or equal to 60 feet in length)* Includes all catcher vessels greater than or equal to 60 feet LOA that used trawl gear for the majority of their catch but are not qualified to fish for pollock under the AFA. They are ineligible to participate in Alaska commercial salmon fisheries with seine gear because they are longer than 60 feet. Vessels must have

harvested a minimum of 5 tons of groundfish in a year to be considered part of this class. The revenue from five tons of Pacific cod at $0.20 per pound is about $2,200. Non-AFA trawl catcher vessels greater than or equal to 60 feet also tend to concentrate their efforts on groundfish, obtaining more than 80 percent of ex-vessel revenue from groundfish harvests. Harvests of pollock by these vessels are substantially lower than those of the AFA qualified vessels, because they have not participated in the BSAI fisheries in recent years.

- *Pot catcher vessel* These vessels are greater than or equal to 60 feet LOA and rely on pot gear for participation in both crab and groundfish fisheries. All vessels included in the class are qualified to participate in the crab fisheries under the Crab LLP. Some of these vessels use longline gear in groundfish fisheries. Vessels in this class are typically equipped with one or two large deck cranes for moving and stacking crab pots and a steel-framed pot launcher. These vessels have an average length of about 100 feet, an average rating of about 175 gross tons, and an average horsepower rating of about 800. Historically, the pot fishery in Alaska waters produced crab. Several factors, including diminished king and tanner crab stocks, led crabbers to begin to harvest Pacific cod with pots in the 1990s. The feasibility of fishing Pacific cod with pots was also greatly enhanced with the implementation of Amendment 24 to the BSAI FMP, which allocated the target fishery between trawl and fixed gear vessels.
- *Hook and line catcher vessel* Vessels greater than 60 feet LOA use primarily longline gear. None of these vessels are qualified for the BSAI Crab LLP. A large majority of the longliner catcher vessels in this class operate solely with longline fixed gear, focusing on halibut and relatively high-value groundfish such as sablefish and rockfish. Both fisheries generate high revenue per ton, and these vessels often enter other high-value fisheries such as the albacore fisheries on the high seas. The reliance of these vessels on groundfish fisheries sets them apart from smaller fixed gear catcher vessels permitted to operate in Alaska salmon fisheries with multiple gear types. Overall, this fleet is quite diverse. Excluding vessels that principally participate in the halibut or salmon fishery, most vessels are between 60 and 80 feet long with an average length of about 70 feet. The larger vessels in this class can operate in the Bering Sea during most weather conditions, while smaller vessels can have trouble operating during adverse weather.

Halibut fishing vessels

Only hook and line gear can be used in the halibut fishery and the vast majority of the halibut catch is taken with longline gear. Participation in this fishery is controlled by the regulations for the halibut IFQ program and the halibut CDQ program. The IFQ program allows very limited participation in the halibut fishery by freezer longline vessels. Halibut catcher vessels principally deliver their catch to inshore processors. However, a small part of the halibut catch is sold directly to restaurants, retail outlets, or the final consumers. Many of the longline fishing vessels operate solely with longline fixed gear, focusing on halibut and relatively high-value groundfish such as sablefish and rockfish. These two groundfish fisheries and the halibut fishery generate high revenue per ton, and these vessels often enter other high-value fisheries such as the albacore fisheries on the high seas. The reliance of these vessels on the halibut groundfish fisheries sets them apart from smaller fixed gear catcher vessels permitted to operate in Alaska salmon fisheries with multiple gear types. Overall, this fleet is quite diverse. Most vessels are less than 60 feet LOA and most of the halibut vessels also participate in the groundfish fisheries. In 2000, 1,643 fishing vessels reported IFQ halibut landings, 1,485 or 90 percent of these vessels were less than 60 feet LOA and 1,149 or 70 percent of these vessels participated in the groundfish fishery.

Shoreside Processors

AFA inshore processors There are six shoreside and two floating processors eligible to participate in the inshore sector of the BSAI pollock fishery. Three AFA shoreside processors are located in Dutch Harbor/Unalaska. The communities of Akutan, Sand Point, and King Cove are each home to one AFA shoreside processor. The shoreside processors produce primarily surimi, fillets, roe, meal, and a minced product from pollock. Other products such as oil are also produced by these plants but accounted for relatively minor amounts of the overall production and revenue. These plants process a variety of species including other groundfish, halibut, and crab, but have historically processed very little salmon. In total, the inshore processors can take BSAI pollock deliveries from a maximum of 97 catcher vessels, as of June 2000, according the regulations implemented by the AFA. The two floating processors in the inshore sector are required to operate in a single BSAI location each year, and they usually anchor in Beaver Inlet in Unalaska. However, one floating processor has relocated to Akutan. The two floating inshore processors have historically produced primarily fillets, roe, meal, and minced products.

Non-AFA inshore processors Inshore plants include shore-based plants that process Alaska groundfish and several floating processors that moor near shore in protected bays and harbors. This group includes plants engaged in primary processing of groundfish and does not include plants engaged in secondary manufacturing, such as converting surimi into analog products (imitation crab), or further processing of other groundfish products into ready-to-cook products. Four groups of non-AFA inshore processors are described below. The groupings are primarily based on the regional location of the facilities: (1) Alaska Peninsula and Aleutian Islands, (2) Kodiak Island, (3) Southcentral Alaska, and (4) Southeast Alaska. Information provided includes all inshore processors for each area and does not include a break down for only those inshore processors required to have 100% and 30% observer coverage, respectively.

Alaska Peninsula and Aleutian Islands Inshore Plants. In 1999, ten Alaska Peninsula and Aleutian Islands plants participated in the groundfish fishery. Between 1991 and 1999, almost all of the facilities reported receiving fish every year from the BSAI. In 1999, these facilities processed 66,635 round weight tons, of which 43,646 tons (66 percent) was pollock and 19,402 tons (30 percent) was Pacific cod. Also in 1999, 36,652 tons (55 percent of the total) came from the Western Gulf and 21,643 tons (32 percent) came from the BSAI.

Kodiak Island inshore plants Most Kodiak plants process all four species groups every year, although generally fewer plants process pollock than process other species. In 1999, all of the facilities processed Pacific cod and Atka mackerel, rockfish, sablefish, and other flatfish (ARSO) and 9 of the 10 processed pollock and flatfish. The facilities processed a total of 101,354 round weight tons of groundfish in 1999, 51 percent of which was pollock and 30 percent of which was Pacific cod. All of the plants receive fish from the Central Gulf subarea every year. Most of the plants also receive fish from the Western Gulf and Eastern Gulf subareas.

Southcentral Alaska inshore plants. This group includes plants that border the marine waters of the GOA (east of Kodiak Island), Cook Inlet, and Prince William Sound. There have been 16 to 22 Southcentral Alaska inshore processors participating in the BSAI and GOA groundfish fishery every year since 1991. In 1999, there were 18 plants in southcentral Alaska processing groundfish. All 18 plants reported processing Pacific cod, flatfish, and ARSO in 1999. In addition, 16 of the 18 reported processing pollock. The facilities processed a total of 10,846 round weight tons of groundfish, 42 percent of which was ARSO and 31 percent of which was Pacific cod. Virtually all of the plants receive fish from the Central Gulf subarea every year. Many also receive fish from the Eastern Gulf subarea, and some receive fish from the Western Gulf subarea. In 1998 and 1999, fewer than four processors took deliveries from catcher vessels operating in the BSAI.

Regulations at §679.5(d) require that shoreside groundfish processors have observers present whenever they receive or process groundfish, if they process more than 1,000 metric tons round-weight during a calendar month. The regulations require observer coverage on 30% of the days they receive or process if they only process 500 to 1,000 metric tons during a calendar month. Other regulations provide special coverage requirements for CDQ and AFA fish. Tables 1a and 1b show the firms that had 100% and 30% observer coverage in 1996-1998.

Table 1a Shoreside plants with 100% observer coverage requirements.

100% Observer Coverage Plants	Area	Primary Products - 1998
Alaska Pacific Seafoods	Kodiak	Pollock: surimi,fillet; Pcod: fillet
Alyeska Seafoods	Dutch Harbor	Pollock: surimi,fishmeal,fish oil
Arctic Enterprise		Pollock: fillet,fishmeal
Cook Inlet	Kodiak	Pollock: h&g,fillet
Cook Inlet	Seward	Pollock: whole, fillet
Int'l Seafoods	Kodiak	Pollock: fillet,surimi; Pcod:fillet
King Crab, Inc		Pollock: fillet; Pcod: fillet
Northern Victor		Pollock: fishmeal,fillet
Ocean Beauty	Kodiak	Pollock: fillet; Pcod:fillet
Peter Pan	King Cove	Pcod: fillet,salted; Pollock:fillet
Star of Kodiak	Kodiak	Pollock: fillet,surimi
Trident Seafoods	Akutan	Pollock: surimi,fishmeal,fillet
Trident Seafoods	Sand Point	Pollock:surimi,meal,fillet;Codfillet
Unisea	Dutch Harbor	Pollock: surimi,fishmeal,fish oil
Western Alaska	Kodiak	Pollock: surimi,fillet
Westward Seafoods	Dutch Harbor	Pollock: surimi,fishmeal,fish oil

Table 1b Shoreside plants with 30% observer coverage.

30% Observer Coverage Plants	Area	Primary Products - 1998
Deep Creek Custom Pack	Homer	Pcod: whole
North Pacific Processors	Cordova	
Resurrection Bay	Seward	Sablefish:h&g; Pcod:h&g
Sahalee of AK	Anchorage	Sablefish:h&g; Pcod:h&g
Seward Fisheries	Seward	Sablefish:h&g;

CDQ groups

The Western Alaska Community Development Quota (CDQ) Program was created by the North Pacific Fishery Management Council in 1992 to help western Alaska communities diversify their local economies and to provide new opportunities for stable, long-term employment. Currently 65 communities are eligible to participate in the CDQ Program. The CDQ communities are located within 50 nautical miles of the Bering Sea coast or on an island in the Bering Sea. About 27,000 people live in the CDQ communties, which are small communities populated predominately by Alaska Native people. These 65 communities have formed six non-profit corporations, called "CDQ groups", to manage and administer their CDQ allocations, investments, and economic development projects.

Through the CDQ program, part of the Bering Sea and Aleutian Islands area TACs for crab, halibut, groundfish and prohibited species are allocated to eligible Western Alaska communities and the CDQ groups. The primary source of income for the CDQ groups is royalties from leasing their CDQ allocations. Since 1982, the six CDQ groups have accumulated assets worth about $187 million, including ownership of small local processing plants, catcher vessels, and catcher processors. The CDQ groups lease quota both to vessels they own and to independent vessels. If CDQ is leased to vessels owned by the CDQ group, they receive royalties from lease of the quota, as well as a share of any profits (or loss) made by the vessel. If CDQ is leased to independent vessels, the CDQ group receives just the royalties. The CDQ groups have used their CDQ allocations to develop local fisheries, invest in a wide range of fishing businesses outside the communities, and provide residents with education, training, and job opportunities in the fishing industry.

Observer provider companies

There were five observer provider companies in 1999, six in 2000, and five are currently active. The principal activity of some of these companies is providing observers for the North Pacific Groundfish Observer Program, but most of them also provide observers for other observer programs or are involved in other business activities. There are substantial differences among the observer providers in terms of both the proportion of their income generated by providing observers for the groundfish fishery and the proportion of the total groundfish observer deployment days they provide. For the purposes of the Regulatory Flexibility Act analysis, most of them are considered to be small entities.

APPENDIX C

Regulatory Changes That Were Considered but Rejected During the Development of Alternatives 2 and 3 and Options 1 and 2,
Problems Areas Without an Identified Solution,
and Actions That NMFS Will Pursue Separately from the Actions Described in Section 2

An Alternative Sunset Data Was Considered and Rejected for Alternative 3

Initially, the sunset date included in Alternative 3 was 2005. This would have extended the current Observer Program regulations for three years. A small minority of the members of the Observer Advisory Committee (OAC) opposed eliminating the sunset date; those members recommended extending the program for five years. This would decrease the probability and cost of having to reauthorize the program before fundamental changes could be made to the program.

Changes to Observer Provider and Observer Regulations Discussed But Not Included in Option 1

In developing the proposed changes to the regulations for observer providers and observers, NMFS considered a number of changes that are not included in Option 1. These other potential changes were excluded due to critical deficiencies that became apparent as Option 1 was developed. NMFS, General Counsel and NPFMC staff, representatives from the observer providers and observers, and the OAC assisted in identifying those deficiencies. The excluded changes are discussed below under the same four headings used to categorize the four types of changes included in Option 1.

A. Changing the observer certification and decertification process to ensure that it is compliant with the Administrative Procedures Act (APA)

Final Agency Decision

With respect to certifying, suspending or decertifying and observer, the OAA's decision will be the Agency's final decision, unless the Science and Research Deputy Director for the Alaska Region modifies the OAA's decision. The alternatives that were discussed and rejected included the following: (1) having the OAA decision be the Agency's final decision; (2) specifying a person other than the Science and Research Deputy Director as the person who can intervene after the OAA has made its decision; and (3) developing a separate appeals office in Seattle. The other persons considered were the Observer Program Leader, the Science and Research Director, and the Regional Administrator. The decision to allow intervention after the OAA's determination is consistent with the existing processes in which the OAA is involved. The Science and Research Deputy Director was selected in order to ensure that the person was sufficiently independent of the Observer Program but in a position to make a decision that affected the capability of the Science Center to effectively perform one of its key missions. The OAA will be used for appeals because this will ensure that the appeals process is APA compliant without incurring the cost of establishing a separate appeals process and office. It will be more efficient to have the OAA handle these appeals than to create a separate entity to do that.

B. Changing the observer certification criteria and standards of behavior to clarify and strengthen these regulations

Certification Criteria

The addition of a minimum grade point average (GPA) criterion was considered to improve the quality of the observers. This change was rejected for the following reasons. The data was not available either to assess the benefits of such a criterion or to determine what the minimum should be. Such a criterion could adversely affect the Observer Program by excluding some individuals that could successfully perform the duties of an observer.

Standards of Behavior

Observers would be prohibited from violating the drug and alcohol policy standards that would be established by NMFS and implemented by the observer providers. The alternatives of requiring observers to meet the drug and alcohol policies either that have been established for Federal employees or that would be established by the individual observer providers were considered but rejected. Because they are the employees of the observer providers, it was determined that the policies established for Federal employees are not necessarily applicable. It was decided that the latter alternative would not necessarily provide the desired level of conformity. Having the standards vary by observer provider could create confusion for observers and fishing vessel and processing plant personnel.

Initially, the proposed change to the observer Standards of Behavior (D) included the following:

> Becoming physically ~~or emotionally~~ involved with vessel or processing facility personnel.

The change currently being proposed is as follows:

> ~~Becoming physically or emotionally involved~~ Engaging in sexual relations with ~~vessel or processing facility~~ personnel of the vessel or processing facility to which the observer is assigned, or with any vessel or processing plant personnel who may be substantially affected by the performance or nonperformance of the observer's official duties.

The currently proposed language makes it clearer what is prohibited and it limits that prohibition to relationships which have a substantial potential to directly affect the ability of an observer, or a subsequent observer on that vessel or at that plant, to successfully perform the duties of an observer and provide quality data.

C. Replacing the observer provider (contractor) certification and decertification process with an APA compliant permitting process similar to that used for other NMFS Alaska Region permits

Application Process

The option of having a fixed term for observer provider permits was considered but rejected because it would increase application costs to observer providers and NMFS without providing any benefits.

An applicant who is initially denied an observer provider permit may appeal to the Alaska Region Office of Administrative Appeal (OAA). The OAA's decision will be the Agency's final decision, unless the Regional Administrator modifies the OAA's decision. The options of using another appeals process and having

someone else have the authority to intervene after the OAA were considered but rejected. The advantages of having a system similar to that used for all other groundfish permits include demonstrated compliance with the APA and efficiencies that would not occur if a separate appeals process were created.

The enforcement of the observer provider responsibilities and duties would be in accordance with the permitting regulations under 15 CFR 904. The option of developing a separate set of regulations solely for the purposes of Observer Program observer providers was discussed but rejected because the efficiencies of using the existing permitting regulations would be foregone without any clear benefit.

Application Criteria

Initially, an applicant would have been required to describe its drug and alcohol policies for observers and its observer recruitment process. The description of the former would have addressed the rules for employees and the actions the employer would take when a drug or alcohol problem occurs. The description of the latter would have addressed both the types of information that would be provided to an observer candidate and the types of questions that the candidate would be asked to answer. This requirement was eliminated due to the related decision to reject the use of policies established by individual observer providers and instead require observer providers to meet interview and drug and alcohol policy standards established by the Observer Program. The explanation for that change to Option 1 is presented elsewhere.

D. Changing the duties and responsibilities of observer providers (contractors) in order to ensure that they are compliant with the APA, to eliminate ambiguities, and to strengthen the regulations governing the relationship between NMFS and the observer providers

Changes to Currently Listed Observer Provider Responsibilities

The potential changes to the items currently listed as observer provider responsibilities and duties that were considered and rejected are discussed below.

Option 1 includes the requirement that observer providers assign observers without regard to any preference by representatives of vessels and shoreside facilities, other than scheduling. The option of making it explicit that this includes any preference based on observer race, gender, age, religion, or sexual orientation was considered. It was not included in the proposal because the proposed language addresses these and all other bases for a preference and because those specific bases are not more important than some other bases.

Alternatives to Two New Responsibilities in Option 1

Alternatives for two new responsibilities or performance standards in Option 1 that were considered and rejected are discussed below.

With Option 1, each observer provider must meet the requirements of an observer candidate interview established by the Observer Program. The alternative of having each observer provider meet the requirements of an observer candidate interview specified by the observer provider was considered and rejected. With that alternative, there would have been less intrusion by NMFS into how each observer provider conducts its business. However, that alternative was rejected for two reasons. First, it would have resulted in less standardization. Second, the observer providers thought that developing their own standards, explaining then as part of the application process, and having to notify the Observer Program of changes to

their interview process would be substantially more burdensome and potentially could reveal confidential business practices.

With Option 1, each observer provider must meet the requirements of the observer drug and alcohol policy standards established by the Observer Program. The alternative of having each observer provider meet the requirements of a drug and alcohol policy specified by the observer provider was considered and rejected. With that alternative, there would have been less intrusion by NMFS into how each observer provider conducts its business. However, that alternative was rejected for two reasons. First, it would have resulted in less standardization, and, therefore it could create confusion for observers and fishing vessel and processing plant personnel concerning the relevant standards of behavior with respect to alcohol. Second, the observer providers thought that developing their own standards, explaining then as part of the application process, and having to notify the Observer Program of changes to their policies would be substantially more burdensome.

Additional Performances Standards Not Included in Option 1

Several new responsibilities or performance standards for observer providers were considered and rejected. They are discussed below.

Performance Issue 1 - Lack of contracts between observers and their employer causes conflicts and misunderstandings during training and deployment. These conflicts and misunderstandings detract from the observers concentration on training and the job.

New performance standard considered and rejected - observer providers will have signed contracts with each observer before the observer enters training or briefing.

This performance standard was rejected because further investigation indicated that this problem has declined significantly in recent years. Most observers fall under a Union agreement and this seems to have resolved the issue.

Performance Issue 2 - First time trainee observers are deployed for long periods without oversight. These first time observers often have problems which require considerable staff time to resolve, and they may produce data of lower quality.

New performance standard considered and rejected - Trainee observers would have to report for a full debriefing within 30 days of the beginning of their first deployment. Observers would be classified as trainees until they had successfully met expectations of NMFS on at least 20 days of at-sea species composition sampling. In addition, trainee observers would be limited to two assignments during this 30 day period.

This performance standard was rejected because it would have aggravated logistical problems for the observer providers. Additional complexities in logistics would have increased the costs of the Observer Program to industry. NMFS believes that the data quality concerns can be addressed by consistent, thorough, in-person mid-deployment data reviews.

Performance Issue 3 - Some first time trainee observers are signing extended contracts (reportedly up to 180 days) before they fully understand what the job entails. This means they are obligated to return to sea

after their first debriefing even if they are not well suited to the job.

New performance standard considered and rejected - observer providers would not be able to enter into contracts with first time observers which are longer than the initial 30 day deployment, plus training and debriefing time.

This performance standard was rejected because NMFS was concerned that this standard would complicate observer provider logistics and could limit employment opportunities for first time observers. Any complications to logistics could increase costs to the industry and limiting employment opportunities is not in NMFS or the observers interest.

Performance Issue 4 - Certain types of fishing operations are too difficult for trainee observers.

New performance standard considered and rejected - observer providers would assign no trainee observers to bottom trawl catcher-processor vessels.

This performance standard was rejected because it may complicate logistics for the observer providers and could make it difficult for these vessels to obtain coverage. NMFS can address some of the data quality issues through the mid-deployment data checks. NMFS will also be considering other ways to address this issue in the future which may include observer sample stations, additional observer training, and deployment of NMFS staff.

Performance Issue 5 - There is an incentive for observer providers to place observers without due concern for an illness that would prevent the observer from performing the normal duties of an observer. This incentive is strongest when a replacement observer is not readily available. When observers who cannot perform their duties are placed on a vessel, the observer cannot provide data, but the vessel gets coverage and both the observer provider and observer are paid.

New performance standard considered and rejected - Observer providers must obtain a "fitness for duty" medical clearance for observers who report illnesses before or during deployment.

This performance standard was rejected because of the lack of adequate medical facilities to make this determination in remote locations. The essence of this standard was retained by dropping the medical clearance but still requiring observer providers to ensure their observers are fit for duty at the time of embarkation.

Performance Issue 6 - Under the current system, there is no link between the employer and employee performance.

New performance standard considered and rejected - X percent of prior observers must have met a minimum debriefing rating of "1" (meets expectations) on their previous cruise.

This performance standard was rejected because it did not solve the core problem. NMFS believes that this issue would best be solved through a direct contract with the observer providers, where payment could be withheld for poor performance of their employees.

Performance Issue 7 - Observers are often sent to other jobs unrelated to groundfish before debriefing (crab

observing, crab training, etc.). Observer providers have considered this still part of their deployment. However, we find these other jobs detract from the debriefing for groundfish.

New performance standard considered and rejected - Observer providers must ensure that their observers debrief with NMFS before performing other jobs or duties which are not part of NMFS groundfish requirements.

This performance standard was rejected because NMFS was concerned that it would limit employment opportunities for observers. NMFS is still concerned about obtaining a quality debriefing and has addressed this by requiring the debriefing report to be completed prior to performing other jobs or duties which are not part of NMFS groundfish requirements. The debriefing can then be completed after their other work and the groundfish information is not lost. This problem is also addressed by explicitly including all vessels in the no more than four vessels per deployment rule.

Problems Areas Without an Identified Solution

Unresolved Issue 1 - Current observer providers practices sometimes result in poor caliber recruits. NMFS can require consistent interviewing but we cannot regulate the hiring decision.

Unresolved Issue 2 - Observer providers are not directly accountable to NMFS for the performance of their employees. Observer providers are paid by industry to provide coverage, and coverage requirements are fulfilled regardless of the job the observer does.

Unresolved Issue 3 - NMFS cannot ensure that observer providers pay observers.

Unresolved Issue 4 - Under the current system, observers who report accurately can put themselves out of a job. For example, accurate data on halibut can close a fishery and eliminate the observers job.

Unresolved Issue 5 - The applicability of the Service Contract Act (SCA) to the existing service delivery model is still in question and NMFS is working with the Department of Labor (DOL) to resolve it. If the DOL determines that the existing system requires SCA wages, all observer providers would be required to pay a wage at least comparable to the union wage, or if there were no established union wage, they would be required to pay a wage at least as high as the wage standard that would be established by the Department of Labor.

A Rejected Sub-Option for Option 2

The following sub-option was considered but rejected. The sub-option would provide a mechanism to prevent the industry from getting free observer coverage when it is provided by NMFS. The more direct mechanism of having the industry pay NMFS for that coverage is not authorized under the MSA. With this sub-option, when NMFS staff or another qualified person is deployed by NMFS to perform the normal duties of an observer, the vessel or plant would receive credit towards its observer coverage requirements if it agreed pay its observer provider an amount equal to 80% of what it would have had to pay for the deployment days had they been provided by its observer provider. This would be done with the understanding that the observer provider would use such payments to provide observers for vessels at the discretion of the Observer Program. For example, if the deployment were for 10 days, and if the cost of obtaining an observer from its observer provider for those 10 days would have been $3,350, the vessel owner

or operator would receive credit towards its observer coverage requirements if it paid it observer provider $2,680 that would in turn be used to place observers on vessels or at plants selected by the Observer Program. The vessels basically would be providing observer deployment days for NMFS to use on vessels and at plants of its choosing. With this sub-option, NMFS could have up to 280 additional observer deployment days if it deployed NMFS staff and other qualified persons for 350 days to perform observer duties on vessels or at plants with observer coverage requirements. These coverage days could be used, for example, to increase observer coverage on vessels with 30 percent coverage requirements, on vessels with no coverage requirements, and to conduct special projects beyond the scope of normal observer duties.

This sub-option would be an alternative to using the Research Plan fee collection authority to address the problems of having some vessels and plants receive observer coverage credit at no cost. Assuming an average cost of $335 per observer deployment day provided by an observer provider, the total cost of providing 280 deployment days for NMFS to use would be about $94,000. This sub-option would address the equity concern of some vessels or plants receiving observer coverage at no cost and it would provide funds that could be used to pay for increased observer coverage. The latter would allow an increase in the overall level of observer coverage and offset the reduction in income opportunities for observers and observer providers that would occur with Option 2. The payment would be 80% of the normal cost of receiving observer services to at least partially offset the additional cost vessels and plants would have when they switch between an observer provider's observer and an observer provided by NMFS.

This sub-option was rejected for the following reasons. First, with this sub-option, the additional cost to the fishing industry resulting from the deployment of NMFS staff and other qualified persons might not be fully offset. The additional costs include the transportation cost of terminating the use of a normal observer and getting a normal observer after such deployments. Second, the cost to NMFS of administrating this sub-option could be high compared to the benefits it would provide. Third, depending on the specifics of the additional deployments of normal observers with this sub-option, the number of deployment or coverage days provided by this option could be less than 80 percent of the deployment days provided by NMFS staff and other qualified person under Option 2. Fourth, the use of observer provider observers on vessels less than 60 feet LOA would raise issues that could be difficult to resolve. Finally, the time required to sort out this sub-option and to determine if it should be used could delay the approval of the more critical elements both of Option 2 and of the other actions discussed in this document.

Actions that NMFS Will Pursue Separately from the Actions Described In Section 2

The regulatory actions included in Alternatives 2 and 3 and Options 1 and 2 are expected to extend the Observer Program beyond 2002 and to improve the quality of the data provided by the Observer Program. The latter would be done by addressing some of the deficiencies of the current Observer Program regulations. NMFS intends to address some of the deficiencies via mechanisms other than the regulatory actions described above. These other mechanisms are described below by topic.

Observer Coverage Responsibilities and Shortages

In addition to changing the responsibilities and duties of observer providers to include the requirement that each observer provider supplies observers as agreed to in signed and valid contracts with its clients, NMFS proposes the following actions to address the issue of observer coverage responsibilities and shortages.

1. Increase the observer coverage requirements of vessels that fall short of meeting their

requirements. The deficiency in terms of days of observer coverage would be required to be made up in a subsequent quarter. However, no meeting quarterly coverage requirements would remain a violation.

2. NMFS will work to develop a more timely and effective method for monitoring compliance with observer coverage requirements.

3. NMFS will explore the potential of incentives for voluntary observer coverage pools to address the coverage problems for vessels with 30% coverage requirements.

Observer Safety

In addition to requiring observer providers to ensure that fishing vessels have current safety decals, NMFS will build on its already well developed safety training curriculum and consider adding additional modules to continue improvement in this area. In addition, NMFS and the U.S. Coast Guard will discuss ways to improve the web accessible safety decal database to see if it can be updated in a timely manner.

OPO Policy Changes to Assist Observer Providers in Meeting their Responsibilities and Duties

The OPO is exploring ways to provide more information to each observer provider concerning the performance of the observers it employs. The final evaluations completed by NMFS are currently provided to observer providers but training scores and comments, and mid-cruise debriefing records are not. NMFS will address the issues associated with making this additional information available to observer providers.

APPENDIX D

Regulations Governing Standards of Observer Conduct and
Groundfish Observer Program Prohibitions

STANDARDS OF OBSERVER CONDUCT REGULATIONS
§ 679.50 Groundfish Observer Program
Subpart E--Groundfish Observer Program
(applicable through December 31, 2002)

(2) Standards of observer conduct

(i) Conflict of interest.

(A) Observers:

(1) May not have a direct financial interest, other than the provision of observer services, in a North Pacific fishery, including, but not limited to, vessels or shoreside facilities involved in the catching or processing of the products of the fishery, concerns selling supplies or services to these vessels or shoreside facilities, or concerns purchasing raw or processed products from these vessels or shoreside facilities.

(2) May not solicit or accept, directly or indirectly, any gratuity, gift, favor, entertainment, loan, or anything of monetary value from anyone who conducts activities that are regulated by NMFS, or who has interests that may be substantially affected by the performance or nonperformance of the observers' official duties.

(3) May not serve as observers on any vessel or at any shoreside facility owned or operated by a person who previously employed the observers.

(4) May not solicit or accept employment as a crew member or an employee of a vessel or shoreside processor in a North Pacific fishery while under contract with an observer contractor.

(B) Provisions for remuneration of observers under this section do not constitute a conflict of interest under this paragraph (h)(2).

(ii) Standards of behavior. Observers must avoid any behavior that could adversely affect the confidence of the public in the integrity of the Observer Program or of the government, including but not limited to the following:

(A) Observers must diligently perform their assigned duties.

(B) Observers must accurately record their sampling data, write complete reports, and report honestly any suspected violations of regulations relevant to conservation of marine resources or their environment that are observed.

(C) Observers must not disclose collected data and observations made on board the vessel or in the processing facility to any person except the owner or operator of the observed vessel or processing facility,

an authorized officer, or NMFS.

(D) Observers must refrain from engaging in any illegal actions or any other activities that would reflect negatively on their image as professional scientists, on other observers, or on the Observer Program as a whole. This includes, but is not limited to:

(1) Engaging in excessive drinking of alcoholic beverages;

(2) Engaging in the use or distribution of illegal drugs; or

(3) Becoming physically or emotionally involved with vessel or processing facility personnel

GROUNDFISH OBSERVER PROGRAM PROHIBITIONS REGULATIONS
(Observer harassment)
§ 679.7 ***Prohibitions***
***(g) Groundfish Observer Program*.**

(1) Forcibly assault, resist, oppose, impede, intimidate, sexually harass, bribe, or interfere with an observer.

(2) Interfere with or bias the sampling procedure employed by an observer, including physical, mechanical, or other sorting or discarding of catch before sampling.

(3) Tamper with, destroy, or discard an observer's collected samples, equipment, records, photographic film, papers, or personal effects without the express consent of the observer.

(4) Prohibit or bar by command, impediment, threat, coercion, or by refusal of reasonable assistance, an observer from collecting samples, conducting product recovery rate determinations, making observations, or otherwise performing the observer's duties.

(5) Harass an observer by conduct that has sexual connotations, has the purpose or effect of interfering with the observer's work performance, or otherwise creates an intimidating, hostile, or offensive environment. In determining whether conduct constitutes harassment, the totality of the circumstances, including the nature of the conduct and the context in which it occurred, will be considered. The determination of the legality of a particular action will be made from the facts on a case-by-case basis.

(6) Fish for or process fish without observer coverage required under subpart E of this part.

(7) Require, pressure, coerce, or threaten an observer to perform duties normally performed by crew members, including, but not limited to, cooking, washing dishes, standing watch, vessel maintenance, assisting with the setting or retrieval of gear, or any duties associated with the processing of fish, from sorting the catch to the storage of the finished product.